TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 4.

AMADO CHAVES ET AL., APPELLANTS,

vs.

THE UNITED STATES ET AL.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

FILED OCTOBER 7, 1893.

(15,413.)

(15,413.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 40.

AMADO CHAVES ET AL., APPELLANTS,

vs.

THE UNITED STATES ET AL.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

INDEX.

	Original.	Print.
Caption	1	1
Petition	2	1
Answer of the United States	8	4
Answer of Perea *et al*	13	6
Replication	20	10
Minutes of trial	23	11
Order taking cause under advisement	24	12
Evidence	25	12
Petition of Chaves to U. S. surveyor general	25	12
Supplemental petition of Chaves to surveyor general	26	13
Petition to governor	27	14
Grant	27	14
Juridical possession	27	14
Certificate of the alcalde	29	15
Letter of alcalde to governor, December 1, 1808	32	16
Letter of governor to alcalde, December 13, 1808	33	17
Letter of T. M. T. Cazin to surveyor general	34	18
Brief of claimants before surveyor general	36	20
Opinion of surveyor general	38	22

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 18, 1896.

	Original.	Print.
Evidence before surveyor general	40	23
Testimony of Santiago Garcia y Montoya	40	23
Nerio Antonio Montoya	43	25
Agustin del Valle	48	27
Plat of the Cañon de San Diego grant	50	28
Plat of the Cañon de San Diego grant	51	28
Opinion of the court	52	28
Dissenting opinion of Stone, judge	65	34
Dissenting opinion of Murray, judge	69	35
Final decree	84	47
Petition for and allowance of appeal	85	47
Transcript of testimony	86	47
Testimony of Amanda Boardman	87	47
Amado Chaves	87	48
Will M. Tipton	97	54
Jesus Trujillo	99	56
Emiterio Archuleta	109	63
Francisco Perea	115	67
Juan Martin	118	69
J. W. Miller	120	71
Antonio Jose Garcia	121	71
J. W. Miller (recalled)	123	73
Jesus Trujillo (recalled)	124	73
B. S. Rodey	126	75
Jesus Trujillo (recalled)	128	76
Stenographer's certificate	129	77
Clerk's certificate	130	77

1 In the United States Court of Private Land Claims in and for the Territory of New Mexico.

AMADO CHAVEZ, ROMAN BACA, F. Manzanares, Augustin del Valle, Florencio Sandoval, Plaintiffs, *vs.* THE UNITED STATES and C. H. Gildersleeve, M. S. Otero, Francisco Perea, Defendants.	No. 100. Petition in the Private Land Claim Canon del San Diego.

2 To their honors the judges of said court:

Now come the above-named plaintiffs, your petitioners, by their counsel, Geo. Hill Howard, Jeffries and Earl, and respectfully represent that they are in part the heirs and legal representatives of Francisco Garcia de Noriega and Jose Antonio Garcia de Noriega, deceased.

2. That prior to January 27th, 1788, the said Francisco and Jose Antonio Garcia de Noriega submitted their petition to *to* Fernando de La Concha, the civil and military governor of the province (now Territory) of New Mexico, for a grant of a tract of land in the county of Bernalillo, in said Territory, described and known as the "Canon de San Diego."

3. That on the 27th day of January, 1788, the said Governor Concha granted the said tract of land to the said petitioners and directed the chief alcalde of the queres, Don Antonio Armenta, to place them in juridical possession of the granted premises.

4. On the 6th day of February, 1788, the said Antonio de Armenta, chief alcalde as aforesaid, in conformity to said order of the said Governor Concha, dated January 27th, 1788, delivered to the said petitioners, Francisco and Jose Antonio Garcia de Noriega, juridical possession of the lands embraced in said grant, pointing out to them its boundaries, as follows: "On the north side the water leap (salto del agua), on the south side the junction of the rivers, and also a point of a red mesa and the lands of the said Indians, and with respect to the east and west there are only some very high mesas on both sides of the cañon, and these serve as the boundary line."

5. That the said grantees, having been thus placed in legal possession of said granted premises as above described, in accordance with the laws, customs, and usages of Spain then in force in said province, continued and remained in possession thereof during their
3 lifetime, and since their decease said granted premises have been in the exclusive lawful possession of the heirs and legal representatives of the said grantees up to the present time.

6. That said grant is perfect and invested the said Francisco and Jose Antonio Garcia de Noriega with a complete and perfect title to said granted premises. The said tract, having been segregated from the royal domain by the grant, never became the public lands of Mexico or of the United States.

That on the 6th day of March, 1798, the said grantees, having been in the exclusive and lawful possession of the granted premises for a period of ten years, jointly with four more brothers and fourteen additional persons, petitioned the then governor of said province, Don Fernando Chacon, for a grant of land now known as the grant to the "town of the Canon de San Diego," comprising 116,288.89 acres, more or less, and embracing within its confirmed outboundaries the tract known *known* as the "Canon de San Diego," which had been granted as aforesaid to the said Francisco Garcia de Noriega and his brother, Jose Antonio, January 27th, 1788, by said Governor Concha; and on the said 6th day of March, 1798, the said Governor Ferna-do Chacon granted to the petitioners, number- in all twenty different persons, the said tract known as the grant to the "town of Canon de San Diego."

On the 14th of March, 1798, juridical possession was delivered to the last-mentioned grantees by the chief alcalde, Antonio de Armenta, of the last-mentioned tract of land known as the grant to the "town of the Canon de San Diego," with the exception of so much thereof as had hitherto been granted to said Francisco and Jose Antonio Garcia de Noriega by Governor Concha January 27th, 1788, and which by virtue of said grant was already the property of the said last-mentioned grantees and had been in their possession from the time the same was delivered to them by the
4 chief alcalde on the 6th day of *same was delivered to them by the chief alcalde on the 6th day* of February, 1788, by direction of the said Governor Concha, in the said grant decree aforesaid dated January 27th, 1788.

That said grant of March 6th, 1798, was confirmed by Congress June 21st, 1860.

8. Plaintiffs further allege that on or about the 31st day of December, 1879, the heirs and legal representatives of Francisco and Jose Antonio Garcia de Noriega, the owners and possessors of said Canon de San Diego tract under their said grant from Governor Concha, January 27th, 1788, as aforesaid, presented their claim to Henry M. Atkinson, Esq., the then surveyor general of the Territory of New Mexico, for examination and decision, in accordance with the provisions of the 8th section of the act approved July 22nd, 1854. On the 22nd day of March, 1880, the case was heard by the said surveyor general, who decided that the said grant was valid, recommended its confirmation by Congress, and forwarded the papers for that purpose.

It was further decided by said surveyor general that the junior grant of March 14th, 1798, did not affect the title of the lands granted in 1788 to Francisco and Jose Antonio Garcia de Noriega, who had been placed in juridical possession of said tract known as the "Canon de San Diego" by order of said Governor Concha, in 1788, in the senior grant decree.

Said Canon de San Diego tract was surveyed May, 1880, which survey was approved September 25th, 1880, by said Henry M. Atkinson, surveyor general, and reported to Congress for confirmation.

9. It appears from said survey that said Canon de San Diego

grant contains 9,752.57 acres of land; a plat of which said survey is filed herewith as petitioners' sketch map, marked Exhibit C.

10. That no furthe- action has been taken relative to the Canon de San Diego grant by or under authority of the United States.

5 11. That notwithstanding diligent search by your petitioners they have been unable to find the original borrador or archive copy and evidence of the said grant for the reason of the notoriously incomplete and mutilated condition of the Spanish and Mexican archives in the possession of these United States.

That the original testimonio, expediente, or grant document, which was, under the law, usage, and custom of the country at the time of the said grant, made, issued, and delivered to the said grantees as their evidence of title, remained in their possession and of their descendants and legal representatives until the same was, —— —, A. D. 18—, filed in the office of the United States surveyor general for the Territory of New Mexico, and now there on file as *as* file No. —, and therefore without the control of your petitioners. Wherefore they file herewith true copies thereof, marked Exhibit A.

Your petitioners file herewith copy in duplicate of the record and proceeding in the matter of this said grant had before the surveyor general as containing, first, correct copies and translation of the said grant; 2nd, of certain subsequent proceedings had before the surveyor general of New Mexico in the matter of the said grant, wherein the said subsequent grant was declared not to affect this said Canon de San Diego, the prior grant; 3rd, the petitions, showings, and arguments of counsel had, made, and adduced in the said matter of this said grant before the said surveyor general; 4th, the decision of the surveyor general, Atkinson; 5th, and for the purpose of availing themselves under the law of the evidence then adduced and contained in the said record, filed as "Exhibit B."

6 12. That there are no gold, silver, or quicksilver mines or minerals within the boundaries of said tract.

13. That there are no parties, to the knowiedge of your petitioners, claiming adversely to this said Canon de San Diego grant or to your petitioners other than the said defendants, who are in possession of portions of the same, claiming title under the said subsequent grant of the town of San Diego. Wherefore they are made defendants hereto.

14. That your petitioners are interested in this said Canon de San Diego grant by way of inheritance from Francisco Garcia and Jose Antonio Garcia de Noriega, the original grantees, and are also the legal representatives in part of the said grantees through purchase from some of their descendants; that they cannot now specifically set forth their several interests, but offer so to do upon the trial of this cause should they be so required.

Whereupon your petitioners pray that the validity, extent, and location of the said grant of the Canon de San Diego may be inquired into and decided by this court, and that the same may be by your decree established, confirmed, and set apart unto the heirs and legal representatives of the original grantees thereof, to wit, Fran-

cisco Garcia de Noriega and Jose Antonio Garcia de Noriega, in accordance with the metes, bounds, and natural objects in the act of possession set forth, and for such other and further relief as in equity and justice may to the court seem meet and proper in the premises.

GEO. HILL HOWARD,
JEFFRIES & EARLE,
Counsel for Petitioners.

7 [Endorsed:] No. —, file —. In the United States court of private land claims. Amado Chavez *et al.*, plaintiffs, *vs.* The United States *et al.*, def'ts. Petition in Cañon de San Diego grant. For Gildersleeve. Geo. Hill Howard, Jeffries & Earle, counsel for petition-s.

8 UNITED STATES OF AMERICA, *ss:*

In the Court of Private Land Claims, Santa Fé District, July Term, 1893.

AMADO CHAVES *et al.*, Plaintiffs,
vs.
THE UNITED STATES *et al.*, Defendants. } No. 100.

Answer.

Comes now The United States, by its attorney, Matt. G. Reynolds, and separately answering so much of the petition filed in said cause as may be necessary says:

It has no knowledge or information sufficient to enable it to form a belief as to whether or not the petitioners are the heirs or legal representatives of a part thereof of Francisco Garcia de Noriega and Jose Antonio Garcia de Noriega, deceased.

It says it has no knowledge or information sufficient to enable it to form a belief as to whether, on the 27th day of January, 1788, Governor Chacon granted the land described in the fourth paragraph of said petition to said parties, nor as to whether he ordered them placed in possession thereof.

It denies that one Antonio de Armenta, as chief alcalde, did, on the order of Governor Chacon, on the 6th day of February,
9 1788, placed said Garcia brothers in the juridical possession of the land described in the fourth paragraph of said petition or any part thereof.

It denies that said parties remained in possession thereof during their natural lives, and it denies that the same since their death has been in the exclusive and lawful possession of their heirs and legal representatives up to the present time. It denies that the same is or was a perfect or even an imperfect grant, but says there was never a grant at all, as alleged in said petition, made in 1788.

Further answering, it says it believes it to be true that on the 6th day of March, 1798, said Garcia brothers above mentioned, jointly

with eighteen others, petitioned the then governor of said province, Don Fernando Chacon, for a grant of land now known as the town of the Cañon de San Diego grant, but says that it is not true at said time, as alleged, said two before-mentioned Garcia brothers were lawfully in the possession of the premises alleged to have been granted in 1788, and says it is not true that said town of the Cañon de San Diego grant was petitioned for as an additional grant to said alleged grant of the Cañon de San Diego of 1788.

Further answering, it says that said grant of 1798 embraces within its outboundaries the entire grant sued for in this case. The defendant admits that juridical possession was given to said twenty alleged grantees to the town of the Cañon de San Diego grant as required by law, but it denies that any exception of any kind or character whatsoever was made in the latter grant to the said twenty grantees, but, on the contrary, avers the fact to be that
10 said town of the Cañon de San Diego grant, which includes and surrounds the grant sued for, *am*kes any reference thereto or any reservation thereof, as alleged.

Further answering, it says that if any such grant as alleged was ever made to said Garcia brothers in the year 1788 to the land sued for in this petition, the same was never accepted, or if it was it was abandoned prior to and at the time they joined eighteen others in petitioning for the larger grant, which was made in 1798, as alleged.

Further answering, it says that said Garcia brothers, as petitioners and grantees of the grant of 1798, took each an allotment or suerte of land to cultivate and live upon that was given out in severalty to each of said twenty petitioners in 1798, when they were placed in juridical possession of the same, which said allotments constitute no part nor are they directly connected with the land alleged to have been granted in 1788 to them, but are about three miles south of the south line of said tract as claimed by the plaintiffs.

Further answering, the defendant alleges that the heirs and legal representatives of the twenty alleged grantees of the grant of 1798 in the year 1859, under the provisions of the law, presented the same to the surveyor general, and it was through the proper channels duly reported to Congress, and the same confirmed on the 21st day of June, 1860, and thereafter patented to the heirs and legal representatives of the said alleged twenty grantees, two of which twenty grantees were the alleged grantees of the grant of 1788; that by said act of confirmation of 1860 and by the patent issued thereunder the United States has parted with whatever right,
11 title, or interest it may have acquired to the same under the treaty of Guadalupe Hidalgo.

Further answering, it says that the heirs and legal representatives of said Garcia brothers are stopped to now assert title as against the United States in and to any portion of said land included within patent of the town of the Cañon de San Diego grant, they having failed to apprise the United States of any other claim thereto, and having accepted the release of the United States under the grant of 1798 is an acquittance of Guadalupe Hidalgo, and therefore said claim is one over which this court has no jurisdiction, and want of

jurisdiction is hereby pleaded; also a disclaimer is hereby entered on the behalf of the United States to any interest in and to the land included within the town of the Cañon de San Diego grant, patented, as aforesaid, in 1860, and it is therefore not one which, under the law of nations, the treaty of cession, or the principles of equity, is entitled to a confirmation.

All allegations not hereinbefore answered are denied, and it is demanded that plaintiffs be put to their proof of all the allegations in said petition as provided they shall be by the act of Congress approved March 3, 1891, under which this court assumes jurisdiction of this controversy, and that they may be put to their proof as to their pretended interest in said alleged grant.

Now, having fully answered, it prays the court that a decree may be entered rejecting the claim for said alleged grant and dismissing the petition, and for such other orders as to the court may seem *mete* and proper and which it may be authorized to make in the premises.

Respectfully submitted.

(Signed) MATT. G. REYNOLDS,
U. S. Attorney.

12 [Endorsed:] (Copy.) VI. Case No. 100, file No. —. Amado Chaves *et al.*, plaintiffs, *vs.* The United States *et al.*, defendants. Cañon de San Diego grant. Answer. Matt. G. Reynolds, U. S. attorney.

13 UNITED STATES OF AMERICA, }
Territory of New Mexico. }

In the U. S. Court of Private Land Claims.

AMADO CHAVES *et als.*, Petitioners,
vs.
UNITED STATES, C. H. GILDERSLEEVE, M. S. OTERO, and FRANCISCO PEREA, Defendants. } No. —.

Answer of Francisco Perea (one of the above-named defendants) and Emiterio Archuleta, Tomasa Archuleto de Cordova, Louisa Archuleta de Jaramillo, Pascuala Archuleta de Benivides, Adelida Archuleta de Williams, J. B. Block, James A. Smith, L. A. Judt, Hugh Murray, Bernard S. Rodey, and Hannah Harris, and all of whom are persons interested in preventing the claim of the petitioners from being established; and they respectfully represent that nearly all of them are residents upon the tract of land claimed in the petition, and all are owners and claimants of interests, both divided and undivided, therein, and that they learn, or all save the said Francisco Perea learn, only by chance of the filing of the claimants' petition, as none of them save the said Perea were served with process; and, answering the said bill or petition, or so much or such parts thereof as they are advised it is necessary for them to answer, they say—

That they are without knowledge or information sufficient to form a belief, and they therefore deny, and call upon the petitioners for full proof thereof, that they, the said petitioners, are in part the heirs and legal representatives of Francisco Garcia de Noriega and Jose Antonio Garcia de Noriega, deceased, and—

That prior to January 27th, 1788, the said Francisco and Jose Antonio Garcia de Noriega submitted a petition to Fernando
14 de la Concha for a tract of land known as the "Canon de San Diego," and—

That on said date the said Concha granted the said land to the said petitioners and directed them to be placed in possession of the same, as set forth in the petition, or—

That on the 6th day of February, 1788, one Antonio de Armenta did place the said petitioners in possession of the lands described in the petition or any other lands, or—

That the said grantees, after having been so placed in possession, remained in possession, as described in the petition or otherwise, for any length of time soever, either by themselves or their de-cendants, or—

That the said grant so alleged to have been made was or is perfect in any sense whatsoever or invested the said Francisco and Jose Antonio Garcia de Noriega with a complete or any other sort of title, or that said grant was at said time segregated from the public domain, or that the same never became public land of the Republic of Mexico or of the United States of America, or—

That on the 6th day of March, 1798, the said grantees (Noriegas) had been in the exclusive and lawful possession of the tract of land described in the petition for a period of ten years or for any time whatsoever; but—

These defendants admit that on the 6th day of March, 1798, the said Francisco and Jose Antonio Garcia de Noriega, jointly with some eighteen other persons, did then petition the governor of the then province of New Mexico, Don Fernando Chacon, for a grant of land now known as the grant of the "town of the Canon de San Diego," comprising 116,286.89 acres, more or less, and that said tract does embrace within its outer boundaries the tract described in the petition; and—

These defendants further admit that juridical possession was given at the time and by the official and in the manner to
15 said twenty petitioners of the said large tract of land now known as the "town of the Canon de San Diego grant;" but—

These defendants deny that any exception of any kind or character soever was made in the latter grant to the said twenty grantees, but, on the contrary, these defendants allege and charge the fact to be that said grant, containing as aforesaid about 116,288.89 acres of land, includes the tract of land described in this petition, and makes no reference thereto soever, and the same persons to whom said prior grant is alleged to have been made are both petitioners and grantees in the later grant of 1798, as aforesaid; and—

These defendants, answering further, allege and charge the fact

to be that no legal grant was ever made to the said Francisco and Jose Antonio Garcia de Noriega alone, as alleged in their said petition, and that they never were placed in any possession thereof and have never held possession thereof in any manner whatsoever; but these defendants, further answering, say that if any such grant of any such tract of land as petitioners set forth in their petition was ever made to the said Noriega brothers the same was never accepted by the latter, or if it was it was abandoned because, as before stated, the said Francisco and Jose Antonio Garcia de Noriega joined some eighteen others some ten years later in a petition for the tract of land containing upwards of one hundred and sixteen thousand acres, as aforesaid, and which includes and entirely surrounds the tract the petitioners allege to have been granted in the first instance; and they, the said Noriega brothers, state nothing, either in their petition or otherwise, with reference to their being possessed of the grant described in the petition alleged to have been made in 1788, but, on the contrary, they, the said Francisco and Jose Antonio Garcia de Noriega, joined said eighteen other colonists in
16 said other petition and took each an allotment or suerte of land to cultivate and live upon that was given out in severalty to each of said twenty petitioners at the time, in 1798, when they were so placed in juridical possession of the same, and such land so allotted in severalty was situated some fifteen miles south of the north line or about three miles south of the south line of the tract of land claimed by the petitioners; and—

These defendants, answering further, allege and charge the fact to be that said Noriega brothers nor any one for them never occupied any portion of the land claimed by petitioners, but, on the contrary, these defendants allege and charge the fact to be that the only person who ever occupied any portion of the land claimed by petitioners was Jose Francisco Archuleta, now deceased, who is the ancestor and predecessor in interest of all or nearly all of these defendants; and—

These defendants, answering further, admit that said later and larger grant of land was confirmed by Congress on June 21st, 1860, as set forth in said petition, and they further allege and charge the fact to be that the same was thereafter patented to all of the said original twenty or twenty-two grantees, or, rather, to their legal representatives, and which includes the legal representatives of the said Francisco and Jose Antonio Garcia de Noriega; and—

These defendants, answering further, allege and charge the fact to be that such issuing of a patent for said larger tract, which includes the smaller tract claimed by petitioners, was a selling and granting of the same by the United States, and therefore that under section 14 of the act of Congress establishing this court the same must remain valid and petitioners be relegated to their remedy for compensation as provided in said section; and—

These defendants, answering further, in like manner say that they are without knowledge or information to form a belief
17 as to whether or not the said Canon de San Diego grant was presented to and passed upon by — under the authority and in

the manner as stated in said petition in paragraph eight thereof by the surveyor general of New Mexico, or that the same was surveyed as stated therein, or that it contains 9,752.57 acres, as stated in paragraph nine of said petition, or that no other action has been taken with reference thereto, as stated in paragraph ten of said petition, and they therefore call upon the petitioners for full and complete proof thereof; but these defendants allege that if any such proceedings were had or taken by said surveyor general at the time and in the manner as stated in said bill the same were null and void in every respect, because the said official was not empowered to investigate any claim for land by citizens within a tract already confirmed by Congress, the land being *res adjudicata* as to him.

These defendants, answering further, say that they are without knowledge as to whether or not the petitioners have made diligent search for their original muniments of title in the manner stated, or that they have furnished to this court a copy thereof, with the arguments of counsel, decision of the surveyor general, or of the evidence taken before said surveyor general, and of this fact they call for sufficient proof from the petitioners.

And these defendants, answering further, say they admit that there are no gold, silver, or quicksilver mines or minerals within the boundaries of the tract claimed in the petition; but these respondents, answering further, deny that there are no parties, to the knowledge of the petitioners, claiming adversely to said Canon de San Diego grant or to the petitioners other than the defendants they have named as parties in their said petition, or that they are in possession of any portion thereof, but, on the contrary,
18 these defendants allege and charge the fact to *to* be that all of these defendants are such adverse claimants, and most of them are in possession of portions of the tract claimed in the petition, claiming under said subsequent grant, and that there are a large number of other persons, the names of all of whom are to these defendants unknown, also in possession of portions of said grant and claiming title thereto under said subsequent grant, and all of which was and is well known to the petitioners.

These defendants, answering further, state that they have no knowledge upon the subject of the deraignment of title of the petitioners, as set forth in paragraph fourteen of said petition, and they therefore deny the same and call upon them for sufficient proof thereof, and, in support of the allegations of this answer, these defendants ask leave at the proper time to file herewith and have the same taken and considered as a part of this their answer all of the papers, maps, plats, petitions, grants, concessions, etc., and other muniments of title now on file in the surveyor general's office for the Territory of New Mexico that relate in any manner to the said town of Canon de San Diego land grant, as also the act of Congress confirming the same to the grantees thereof and their legal representatives, as well as the United States patent issued under said act of confirmation.

Wherefore, these defendants having fully answered the said petition and the said petition being, as the court will see, without merit,

they, these defendants, pray that the same may be dismissed and these defendants permitted to go hence without day.

BERNARD S RODEY,
Attorney for Defendants as Aforesaid.

19 [Endorsed:] No. —. United States of America, Territory of New Mexico. In the U. S. court of private land claims. Amado Chavez *et als. vs.* United States, C. H. Gildersleeve, *et als.* Answer of new defendants. Filed in the office of the clerk, court of private land claims, June 16, 1893. J—— Reeder, clerk, by —— ——, deputy. Bernard S. Rodey, att'y for defendants, Albuquerque, N. M.

20 *Replication.*

These repliants, saving and reserving unto themselves all and all manner of advantages and exceptions to the manifold insufficiencies of the answer herein and of the pleas in it contained, for replication thereunto say that they will prove their petition to be true, certain, and sufficient in law to be answered unto, and that said answer of defendants and said pleas in it contained are uncertain, untrue, and insufficient, *to* this, to wit:

That said grant of 1788 to the Garcias was accepted by them and was never abandoned by said Garcias, who were the sole grantees therein, and in this, to wit:

These repliants deny that the grant of 1798 included that of 1788 and demand strict proof thereof, but if it be true, as alleged, that said grant of 1788 was wholly embraced in that of 1798, and the United States has parted with whatever right, title, or interest it may have acquired to the same under the treaty of Guadalupe Hidalgo, *non constat* that the grant of 1788 is not entitled to be confirmed by this court, and they say that said grant of 1788, being a perfect and complete grant by the Spanish Crown, the area covered thereby became and was segregated from the royal domain and the United States never acquired any right, title, or interest therein by said treaty; that it became and was and now is the duty of the Government of the United States, by and under the provisions of the treaty of Guadalupe Hidalgo, to investigate said grant and confirm the same; that the confirmation of either grant, to wit, that of

21 1798, by Congress, or that of 1788, by this honorable court, operates as a quitclaim merely and does not affect the rights of third parties.

And these repliants further say that they duly presented their claim and right under the grant of 1788 to the surveyor general under the act of July 22, 1854, which act contains no limitation as to the time in which the same shall be presented, and they deny that "they have failed to apprise the United States of any other claim than that under the grant of 1798 to themselves and 18 others." These repliants further deny that they have accepted the release of the United States under the grant of 1798 by or through any act done or things suffered by them, but, on the contrary, they

aver that at the time juridical possession was given to the 20 grantees in the grant of 1798 they expressly claimed and reserved their rights under the grant of 1788, and the same were then expressly admitted and recognized and fully acknowledged, and they have ever since expressly claimed the same; that they not only duly presented their claim in this court under the terms of the act of March 3, 1891, and they expressly deny that they have done or committed or suffered any act or thing whereby they are estopped to prosecute their claim and rights or have impaired their right to recover under the grant of 1788, and in this, to wit:

These repliants allege and aver that as a confirmation by the United States is but a quitclaim on the part of the United States, the sole and only defense which the United States can under the laws and treaties of the United States here make is as to the legal validity of the repliants' grant and of their right to its confirmation as such, and they allege and aver, to their great regret, that this court is without jurisdiction to pass upon the relative merits
22 of conflicting grants, and is therefore without jurisdiction to pass upon a defence by the United States resting solely upon such alleged conflict.

And that the whole of said answer of defendants is uncertain, untrue, and insufficient to be replied unto by these repliants; without this, that any matter or thing whatsoever in said answer contained material or effectual in law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things these repliants are and will be ready to aver and prove as this honorable court shall direct, and humbly pray as in an- by their said petition they have already prayed.

GEO. HILL HOWARD,
JEFFRIES & EARLE,
Attorneys for Plaintiffs.

23

JULY 21, 1893.

The above-entitled cause was set for trial on the second day of August.

AUGUST 2ND, 1893.

This day came the parties in the above-entitled cause, by their attorneys, George Hill Howard, Esq., and Messrs. Jeffries & Earle, attorneys for the plaintiffs, and the U. S. attorney appearing for the defendant, Bernard S. Rody, Esq., appearing as counsel for the following persons, who filed answer claiming to be persons claiming adversely to the plaintiffs, to wit, Francisco Perea, Emitenio Archuleta, Tomasa Archuleta de Cordova, Luisa Archuleta de Jaramillo, Pascuala Archuleta de Benavides, Adlaida Archuleta de Williams, J. B. Block, James A. Smith, L. A. Judt, Hugh Murray, Bernard S. Rodey, and Hannah Harris.

Upon motion of the United States attorney, Bernard S. Rodey, Esq., T. B. Catron, Esq., and W. B. Childers, Esq., were associated with the United States in this cause, representing the codefendants; and the cause coming on for trial, and the pleadings herein and the

petition of the petitioner, the answer of the *answer of the* United State and also the answer of Bernard S. Rodey, Esq., for the above-mentioned persons claiming adversely to plaintiffs, here oral and documentary evidence was introduced by plaintiffs, after which the court took a recess until two o'clock p. m.

And on this same day the trial of the above-entitled cause
24 was continued from this morning; all the attorneys in the cause present. Further oral and documentary proof was introduced.

AUGUST 3RD.

The above-entitled cause coming on to be further heard, there appeared Matt. G. Reynolds, Esq., U. S. attorney, and Messrs. Geo. Hill Howard, Jeffries & Earle, attorneys for the plaintiffs; Bernard S. Rodey, Esq., attorney for new defendants, and T. B. Catron and W. B. Childers, Esqs., associated with the United States in this cause, representing the codefendants.

Additional oral and documentary evidence was introduced.

And on the same day, the above-entitled cause coming on to be further heard, there appeared all of the attorneys in the cause, and, after full argument by counsel, the cause was submitted to the court, and the court, not being sufficiently advised in the premises, put the cause under advisement.

25 *Canon de San Diego.*

(Copy.)

To the Hon. Henry M. Atkinson, U. S. surveyor general:

Your petitioners, the heirs and legal representatives of Francisco Garcia de Noviega and Jose Antonio Garcia de Noviega, deceased, respectfully represent:

That they are the owners of a certain piece or parcel of land situate in the county of Bernalillo in New Mexico known as the Canon de San Diego tract of land, which land was on the 27th day of January, 1788, granted and delivered to the said de Noviegas by the Spanish government, as will more clearly and fully appear from the original grant to them herewith filed, marked A, and made a part of this petition; and they also file herewith and make a part hereof a certain official document marked B executed and bearing date March 14, 1798, recognizing and confirming the claim of said grantees de Noviega to said land against any other claim thereto, and in particular against a certain other grant for adjoining lands made in 1798 to the settlers of the Canon de San Diego, and which grant in 1798 is in your office and is known as private land claim No. 25; and your petitioners also present a sworn translation in English, marked C, of said original grant and of said official document. They also present a sketch map, marked D, of the tract of land claimed under said grant to said de Noviegas, which sketch map represents the said tract as accurately as is practicable without a survey, none having ever been made of the same.

That the said grantees de Noviega and their descendants and heirs have been in the continuous, peaceable, and quiet possession of said land from the time the said — was granted in 1788 down to the present time; that they are the only lawful owners of said premises; and that they know of no valid adverse claim to the same.

Your petitioners pray that your honor proceeds to investigate and pass upon their said claim at as early a time as practicable under the treaty of Guadalupe Hidalgo and the laws of Congress enacted for carrying into effect its provisions in this behalf, and they ask that said grant be approved and confirmed, and the said land be surveyed by the government.

AMADO CHAVES,
For Himself and Other Heirs.

(Recorded on pages 500 and 501, volume 6, of Record of Land Claims in surveyor general's office.)

26 *Canon de San Diego.*

(Copy.)

To the Hon. Henry M. Atkinson, surveyor general:

Your petitioners, the heirs and legal representatives of Francisco Garcia de Novega and Jose Antonio de Novega, deceased, beg leave to represent to you in addition to their petition already filed in your office in the claim of said heirs and legal representatives under the grant for the land known as the Canon de San Diego tract:

That since the filing of the said grant in your office they have learned of the existence and have examined in your office two certain papers relating to this grant and which are material to the premises of their said claim, to wit, papers on file No. 379 of archives, and one of which papers is an official communication addressed to Lieut. Col. Jose Manrique, governor, dated at Santa Ana December 1, 1808, and signed by Ignacio Sanchez Vergara, alcalde of the jurisdiction of Jemes, and the other of which papers, dated at Santa Fé December 13, 1808, and addressed to the alcalde at Jemes, is presumed and believed to be the office copy of the reply of Governor Manrique to said official document and entitled to consideration as such.

Your petitioners further represent that said two papers are original and genuine and have remained together in said archives, and that they have always been and are now in the possession of the Government; and your petitioners pray that, as the same pertain to their said claim and no other, they be transferred from said archives to their said claim and be made a part of their said claim, and that when so transferred they be marked E and F respectively and be given due weight and consideration.

AMADO CHAVES,
For Himself and Other Heirs.

Santa Fé, New Mex., January 22, 1880.

(Recorded on pages 501 and 502, volume 6, of the Record of Lan Claims in the surveyor general's office.)

27 *Canon de San Diego.*

(Copy.)

Your excellency Governor Fernando de la Concha:

We, Francisco Garcia de Noriega and Jose Antonio de Norieg with the highest respect appear before your excellency and stat sir, that there being a cañon which they call Canon de San Dieg vacant, and, having observed that cultivation and the pasturing a few animals can be had therein, we place ourselves at the roya feet of your excellency's highness only to ask and supplicate tha you deign in the name of His Majesty to favor us by granting to u the said cañon for the purpose stated, as we lack land for pasturin and, we deserving that His Majesty favor us, we ask as a grant sai cañon, in consideration of which we ask and pray that what we r quest be done, as by doing so we shall receive great benefit an grace.

FRANCISCO GARCIA DE NORIEGA.
JOSE ANTO. GARCIA.

SANTA FÉ, *January* 27, 1788.

I grant in the name of the King, for cultivation and working, th land that the petitioners solicit, the chief alcalde of the queres, Do Antonio Armenta, placing them in possession thereof, provided tha no prejudice whatever results to the Indians or to any of the citizen settled in that vicinity; and, this being done, he will at the end o this decree place the said act of possession, without injury to an third party, to be copied in the government book and written o stamped paper when it reaches this province.

CONCHA.

In this Canon de San Diego, on the sixth day of the month o February, seventeen hundred and eighty-eight, I Antonio de Ar menta, chief alcalde and war captain of the jurisdiction of the quere by virtue of the power on me conferred by his excellency Fernand de la Concha, knight commander de Mora in the order of Santiag lieutenant colonel of the royal armies, civil and military governo of this province of New Mexico, being in said cañon with notifica tion to the natives of the Pueblo of Jemes, who are adjoining sai land, and having designated to them what was their own they re mained well satisfied, as they did not receive any prejudice in tha the said cañon be granted, and also knowing that it is the will o our sovereign that his lands be settled by his subjects in what ma be vacant, and finding no impediment whatever which might inte fere in doing so, and exercising the power which is on me conferre proceeded to said Canon de San Diego, and there appearing non having a better right, and there being no prejudice to any thir

party who might appear to make objection, and said Indians, Francisco Garcia de Noriega, interpreter for the Navajos, and his brother Jose Antonio Garcia de Noriega being present, and
28 they understanding all, I took them by the hand and led them over the land they pulled up grass and threw stones to the four winds, and we all *in solidum* shouted three times "Long live the King our lord!" (whom may God preserve) in sign of true possession, which they took quietly and peaceably, without any objection, its boundaries being the following: On the north side the water leap (*salto del aqua*), on the south side the junction of the rivers, and also a point of a red mesa and the lands of said Indians, and with respect to from east and west there are only some very high mesas on both sides of the cañon, and these serve as boundaries; and, no injury whatever resulting, they remained satisfied with the same; and that it may so appear I, the said chief alcalde Antonio de Armenta, signed this together with the witnesses (two) of my attendance, with whom I act for the want of a public or royal notary, there being none of any kind in this jurisdiction, to all of which I certify.

Rio interlined, valid.

ANTONIO DE ARMENTA. [RUBRIC.]

Witness: SALVADOR ANTONIO SANDOVAL.
Witness: NICOLAS ORTIZ.

29 *Certificate.*

In the Canon de San Diego de Jemez on the fourteenth day of the month of March, year seventeen hundred and ninety-eight, before me, Antonio de Armenta, and there being assembled all the citizens who took possession in said cañon, together with Francisco Garcia de Noriega and Antonio Garcia de Noriega, two brothers of the first possessors, said two Garcias declared in a loud and clear voice, which all heard, because they shouted it with much distinctness, and they all unanimously agreed to abide by what was said by the said Garcias, and their reasons were these:

Friends and brothers, now each of you is about to take the lands of which His Majesty has granted and donated to you; but you are all notified that the lands which we first and in our first grant we have been possessing, be all of you aware that I and my brother are going to enjoy the same freely, without any of those present nor their children nor anybody else shall desire to interpose obstacles, and because as first possessors we have the right to enjoy said lands and to cultivate them with full title, as well ourselves, our children, and our successors; and so that none of those who are present may plead ignorance we have so spoken today, there being no one absent.

The said Garcias having made all the remarks, all unanimously replied that they asked reasonable justice, and that neither by themselves, their children, nor successors would there be interposed any suit or demand against them at any time, and if they perchance

should wish to do so they would take the case until leavin
30 them in peace concerning the said land which they had bee
so justly possessing.

All here set forth I, the said chief alcalde, witnessed, for all th
citizens declared that it was not to them any imposition that th
Messrs. Garcia should enjoy the lands which they were heretofor
cultivating, and that it may so appear whenever requisite I mak
this document in favor of the said two Garcias, I signed the sam
with those of my attendance in the aforesaid cañon in said day
month and year to which I certify.

ANTO. DE ARMENTA.

31 The foregoing translation, made by me from its original, i
correct to the best of my knowledge and belief.

AMADO CHAVEZ.

Sworn to and subscribed before me this thirty-first day of Decem
ber, 1879.

HENRY M. ATKINSON,
Surveyor General.

SURVEYOR GENERAL'S OFFICE,
SANTA FÉ, NEW MEXICO, *Dec.* 31, 1879.

The foregoing translation, having been by me compared with th
originals in Spanish and found correct, is hereby approved and
adopted for the official translation.

DAV. J. MILLER, *Translator.*

(Recorded on pages 512 to 515, volume 6, of Record of Land Claim
in surveyor general's office.)

32 *Canon de San Diego.*

(Copy.)

GOVERNOR: The interpreter of the Navajos, Antonio Garcia, ha
presented to me a document of grant executed to him by the forme
alcalde of this jurisdiction, Antonio de Armenta, under the decree
of Don Fernando de la Concha, as appears from the grant itself
and the whole of the Jemez cañon having been settled under an
order of Don Fernando Chacon in a royal grant made to them and
in which is embraced the land granted to the Garcias, whence re
sults contention between the ones and the others, the latter grantees
alleging title to all the land; and I deeming that the title claimed
by Antonio Garcia is founded in law, he having been the prior set
tler for the period of ten years, with the condition that at the time
they were given possession all the new settlers gave their consent
as said Garcia makes appear by a document which the alcalde exe
cuted to the two brothers and which I inclose to you, together with
the grant of the Garcias, so that after seeing the same you may
order whatever you shall deem proper and may, if Garcia has a

right to the land claimed, confirm and approve the same, to obviate all question which will necessarily result if the latter be not decided by your superiority, by decreeing whether the land of the Garcias is included or not in the grant of the last settlers, and whether a copy of this grant be taken so that the original, which is the one I enclose, may remain in the archives of the government confirmed by you, and the same should be done with the copy, subject to what you may direct, which will be the best and most correct, your ordering what I shall do to avoid proceedings annoying your attention.

God preserve you many years.

IGNACIO SANCHEZ VERGARA.

Santa Ana, 1st of December, 1808.

Lieutenant Colonel Jose Manrique.

SURVEYOR GENERAL'S OFFICE,
SANTA FÉ, NEW MEXICO, *Jan.* 28, 1880.

The foregoing is a correct translation made by me from the original document in Spanish on file in this office, in archive file No. 379.

DAV. J. MILLER, *Translator.*

(Recorded on pages 515 and 516, volume 6, of the Record of Land Claims in surveyor general's office.)

33 *Canon de San Diego.*

(Copy.)

Advised of your official communication of the 1st instant and documents you accompany.

I have to state to you that the subject does not require any decision of mine inasmuch as the grant of the Garcias makes their right clear, which grant, being the older, always has the preference.

The last settlers cannot deny to the Garcias the better title, and so these should always remain on the same grant which they have held hitherto; and if the said new settlers do not coincide you will not permit to them recourse for any such which they may possess they will have to the royal audience of Guadalapara, as the documents referred to were sanctioned by former governors of this province and the said royal audience alone can annul them; with which I answer your official communication aforementioned.

I return to you the documents mentioned that you may deliver them to the party interested.

God preserve you many years.

Santa Fé, 13th December, 1808.

To the alcalde of Jemez.

SURVEYOR GENERAL'S OFFICE,
SANTA FÉ, NEW MEX., *Jan.* 28, 1

The foregoing is a correct translation made by me fro
original paper in Spanish on file in this office, in archive fi
379.

DAV. J. MILLER, *Transl*

(Recorded on pages 516 and 517, volume 6, of the Record of
Claims in the surveyor general's office.)

34 *Canon de San Diego.*

(Copy.)

Hon. H. M. Atkinson, surveyor general of New Mexico, Sant
N. M.

HON. SIR: In presenting the original documents concernin
"Canon de San Diego de los Jemes" land grant, consisting o
a. The original grant, with petition and act of possession.
b. A simultaneous certified copy of the same.
c. The original of a supplementary act to the act of possessi
a larger land grant under the same name granted 10 years late
including the first one in its boundary.
d. The original testament of the surviving wife of Antonio G
de Noriega, one of the two grantees;
Of all of which you returned to the undersigned a certified
I ask permission to explain in the name of the heirs of Jose An
de Noriega, one of the two grantees of the said land grant, the
tention and petition in presenting the said documents throug
the undersigned.
Francisco Garcia de Noriega and his brother Jose Antonio G
de Noriega, both interpreters for the Government to the Na
Indians, petitioned for what was then known and is now kno
the "Canon de San Diego de los Jemes." Governor Concha
to them the grant as petitioned for on January the 27th, 178
possession was given to them on the 6th of February of the
year.
Subsequently and about 10 years thereafter, during whic
grantees had held actual possession of the lands granted to t
or in the year 1798, they jointly with four more brothers, so
pears by one of the documents, and also with 14 more hea
families, or altogether 20 men, petitioned Governor Chacon f
increased, larger grant including the previous grant under the
name.
This larger grant was also made as petitioned for on 6th of M
1798, by Governor Chacon, and possession was given to petiti
on the 14th of the same month by Alcalde Mayor Antonio d
menta de Jemes, and on the day when such possession was g
the two brothers Jose Antonio Garcia de Noriega and Fran
Garcia de Noriega explained with loud, audible voices in the
ence of the alcalde mayor giving possession and of all the

grantees in the larger or extended grant that it had been agreed and understood between them and their new cograntees that they, the two brothers as aforesaid, should remain in and hold exclusive title and possession thereafter as they had until then for ten previous years of the land formerly granted to them and now included in the larger grant, in which they also were the leading petitioners and grantees. Then and there all the other and new parties signified their assent and agreement thereto, and the land granted to Jose Antonio and Francisco Garcia de Noriega 10 years previously remained their own and in their possession, such land being the Canon de San Diego de los Jemes.

The larger land grant has since been approved and has been confirmed by the United States Congress on the 21st of June, 1860, under the name of "town of Canon de San Diego de los Jemes," or absolutely the same name as the first or smaller grant was granted.

Though the existence of the previous grant was known to the heirs of the two grantees, and their exclusive right and possession had been respected for more than half a century, the documents with regard thereto were only lately found in the possession of one of their heirs, Nerio Montoya, who had lived on the land in question for nearly as long a time, he being one of the grandchildren of the grantees. These documents are now presented to your honor with the request to file, examine, and approve them, and to recommend the grant for confirmation by U. S. Congress.

I also would beg leave to file the original document, being the testament or last will of the surviving wife of Jose Antonio Garcia, one of the grantees, in proof of the descendency, and a statement of the present heirs and assignees to the interest of same Jose Antonio Garcia de Noriega.

Antonio Garcia de Norega had of his married wife Maria Francisca Guttievras four children, viz:

1. Maria Riter, of whom there are two sons born in marriage with — Montoya:

a. Juan Montoya.

b. Nerio Montoya.

2. Maria B. Viana, who died without descendants.

3. Maria Antonia, married to Manuel del Valle, of whom there are two children:

c. Augustin del Valle.

d. Adelina del Valle.

4. Josef Rafael, who left a son:

e. Agapito Garcia de Noriega.

a to *e* are the present heirs.

Agapito Garcia sold to Nerio Montoya, and Adelina del Valle in settlement of the estate left to her and brother quitclaimed to Augustin del Valle all her right in the Canon de San Diego de los Jemes grant, and Nerio and Juan Montoya quitclaimed to the same Augustin del Valle one-half of their total interest and gave to the same power of attorney to represent their to them remaining interest. This Augustin del Valle owns in his own name two-thirds, in

power of attorney for Nerio Montoya one-fourth, and in power for Juan Montoya one-twelfth of the total interest of Jose Antonio Garcia de Noriega, the one of two grantees. But Augustin del Valle quitclaimed to the undersigned one-fifth of this total interest in the power of attorney to represent the total interest.

The heirs of Francisco Garcia de Noriega, the other of the two grantees, are as yet unknown to the undersigned, but the petition may be supposed to be in their favor also, and not against their will.

To your honor.

Very respectfully, T. M. T. CAZIN, *Agent.*

(Recorded on pages 524 to 527, volume 6, of Record of Land Claims in the surveyor general's office.)

36 *Canon de San Diego.*

(Copy.)

F. and J. A. GARCIA DE NORIEGA *vs.* THE UNITED STATES. } Canon de San Diego Grant. File No. 128.

Brief of Claimants.

Your honor the surveyor general is requested to notice in the consideration of this claim and of the muniments filed and referred to in connection with it the completeness and perfection with which the title to the land claimed is conveyed, recognized, and confirmed by the Spanish government, from which it emanated. The claimants can imagine no objection which the United States can raise to the genuineness and validity of the grant or to the claim which they have presented under.

There can be no question as to the powers and authority of the officials making and executing the grant in question. The signatures of both the governor and captain general who made and the chief alcalde who executed it are known to the office of the surveyor general, or if questioned their genuineness is susceptible of proof by comparing them with contemporary archives in that office, which is probably now the only means feasible of determining their genuineness after the long period of time elapsing since the making of the grant, and such means are at hand.

The continued possession and occupancy of the tract during the last ninety-odd years by the grantees and those claiming under them is strongly proven by the testimony of witnesses taken in your honor's court in this case. The muniments constituting the claim, which have always been in the possession of the parties in interest, and the testimony of the witnesses supporting it show it to be such a claim as is contemplated, protected, and guaranteed by the treaty

of Guadalupe Hidalgo, between the United States and Mexico, and the law of Congress of July 22, 1854.

Although it appears from the papers in the case that the title to the land claimed under this grant is beyond dispute or question, the claimants respectfully ask your honor's — particularly to the two papers of 1808 referred to in their supplementary petition of January 22, 1880, and which relate both to the grant of 1788 to the De Novegas, under which these claimants hold, and the grant of 1798, under which the claimants in the private land claim in your office, No. 25 ("town of Canon de San Diego"), hold. Those two papers of themselves show that the said grant of 1788 was the prior grant, and was as such judicially and officially recognized and confirmed as conveying to said De Novegas full and exclusive title in fee to the land covered by it. The adverse claim referred to in said papers of 1808 is the only adverse claim to said land claimants have ever known or heard of, and since its decision at that time in favor of the said De Noriegas these — and their successors have been in the undisputed and undisturbed possession of the premises.

If it be objected that one of the said papers of 1808, to wit, that purporting to be from the governor, Jose Manrique, does not bear the signature of that officer, and therefore is not entitled to credence, the claimants answer and claim that it is an official paper, inasmuch as it was found among the preserved government archives, and that it relates directly to this case, inasmuch as it was found in the file containing the papers relating thereto; that it is the rough office copy (probably taken roughly for subsequent record in the government book now missing) of the governor's original communication sent to the alcalde, and that it is entitled to credit and consideration.

The claimants ask your honor to pass upon and approve their said claim to the heirs and legal representatives of said Francisco and Jose Antonio de Noriega at your earliest convenience.

AMADO CHAVES,
For Himself and Other Heirs.

(Recorded on pages 504 and 505, volume 6, of the Record of Land Claims in the surveyor general's office.)

38 *Canon de San Diego.*

(Copy.)

Opinion.

THE HEIRS AND LEGAL REPRESENTATIVES OF FRANCISCO GARCIA DE NORIEGA AND JOSE ANTONIO GARCIA DE NOVIEGA
vs.
THE UNITED STATES.

Before the United States surveyor general in and for the Territory of New Mexico, in the matter of private land claim, file No. 128, now here reported as No. 122, for the Canon de San Diego tract, in Bernalillo county, New Mexico.

This case comes before me for investigation under the treaty of Guadulupe Hidalgo and the 8th section of the act of Congress approved July 22, 1854.

The muniments of title which are produced from the possession of claimants and filed in this office Dec. 29, 1879, consist of the petition of Francisco Garcia de Noriega and Jose Antonio Garcia de Noriega for a grant to a tract of vacant land in the Canon de San Diego, in what is now Bernalillo county; of the grant made by Fernando de la Concha, civil and military governor, January 27, 1788, for the land solicited; of the act of possession, which purports to have been executed February 6, 1788, by Antonio de Armenta, chief alcalde and war captain of the jurisdiction of the Gueves, and of a certificate of the same alcalde under date of March 14, 1798, the date of his giving possession under grant to the town of Canon de San Diego (reported claim No. 25), which embraced the tract claimed under this grant of ten years previous, wherein the said chief alcalde certifies that the two Noviega brothers, grantees in this case, protested that the subsequent grant of 1798 should not interfere with the rights of the previous grantees to the exclusive possession of the tract granted in 1788 and now under consideration to said Noviega brothers, and that the parties in interest of the subsequent grant, being present, assented thereto.

The signature of Governor Concha to the grant and of Chief Alcalde de Armenta correspond to the signatures of those officials upon other documents on file in this office, and are no doubt genuine.

Among the old archives of this office (file No. 379) there appears an original report or protest of Lieutenant Colonel Ignacio Sanchez Vergara, addressed under date of December 1, 1808, to Gov. Chacon, then civil and military governor, wherein he sets forth that the Garcias had presented to him a document of grant executed to them by Antonio de Armenta, the alcalde of that jurisdiction, under a decree of the former governor, Concha, which is the grant now under consideration. The report sets forth that there was conten-

tion between the Garcias and the parties under the subsequent grant of 1798, and desires the governor to decree whether the land granted to the Garcias in 1788 was included in the subsequent grant of 1798.

39 Whereupon the governor acknowledges the receipt of the report, and (in a document in said file No. 397 of the archives, apparently in his own handwriting, although it does not bear his signature), under date of December 13, 1808, states that "the grant of the Garcias makes their right clear, which grant, being the older, always has the preference. The last settlers cannot deny to the Garcias the better title."

The evidence in the case shows continued occupation of this tract by the grantees and their heirs and assigns for many years back as far as the recollection of the witnesses extends, and by common repute prove the date of the grant in 1788.

It is evident that the grant is a valid one, and it is therefore approved to the heirs and legal representatives and their assigns of the said two grantees according to the boundaries set forth in the act of possession executed February 6, 1788.

It is ordered that the two papers in archive file No. 379 referred to be placed with and made a part of this claim, file No. 128, and that a certified transcript in triplicate of all the papers in the case will be transmitted for the action of Congress in the premises.

HENRY M. ATKINSON,
Surveyor General.

Surveyor general's office, Santa Fé, New Mexico, March 22, 1880.

(Recorded on pages 530, 531, and 532, volume 6, of Record of Land Claims in surveyor general's office.)

[Endorsed:] Canon de San Diego. Proceedings before surveyor gen'l. File 128, file 379.

40 *F. G. and J. A. G. de Noriega.*

In the investigation of this private land claim.

Present: Henry M. Atkinson, surveyor general; David J. Miller, translator and interpreter, and Amado Chavez, for himself and the other grant claimants.

SANTIAGO GARCIA Y MONTOYA, being by the surveyor general duly sworn, on his oath declares:

Question by AMADO CHAVEZ. What is your name, age, occupation, and place of residence?

Answer. My name is Santiago Garcia y Montoya; my age is 53 years; my occupation is farmer, and my residence is at the town of Guadalupe, on the Rio Puerco, in Bernalillo county, New Mexico.

Q. Do you know anything of a tract of land known as the Canon de San Diego? And, if so, state where it is situate.

A. I know such a place, the same being in the county of Bernalillo, on the Jemez river, north of the Indian Pueblo of Jemez. It is a well-known place in that section of country.

Q. How long have you known this spot?

A. I have known the place all my life. I was born upon the grant and lived there for 20 years, and since I have moved from there have often been at the place.

Q. To whom was this tract of land reputed to belong in the community?

A. To the heirs of Francisco Garcia de Noriega and Jose Antonio Garcia de Noriega, who are said to have been the original grantees for the tract.

41 Q. Do you know the boundaries of this tract of land? If so, please state them.

A. I know the boundaries as they are understood to be in that neighborhood by the people as follows: On the north the Salto del Agua or waterfall, on the same river, the Canon de Jemez river, running through the tract southwardly; on the east the top or edge of the mesa forming the cañon; on the south the junction of the San Diego river and the Canon de Guadalupe river and the land of the Indian Pueblo of Jemez; and on the west the top or edge of the mesa forming the cañon.

Q. Who have lived upon this tract of land since you have known it?

A. Various persons have from time to time lived upon the tract and cultivated portions of the tract by permission of the owners, and at this time some persons live upon it without permission, but as squatters. When I first knew the tract one of the grantees, Antonio Garcia de Noriega, lived there with his family. He died in or about the year 1835, when I was about 10 years old and when he was about 70 years old, and upon his death his family moved to near the junction of the rivers upon the tract. When I was born Francisco Garcia de Noriega, also one of the original grantees, lived with his family upon the tract, as I have been informed, and I know his heirs lived upon the land and that some of them live there yet.

Q. Do you know of any adverse claim for this tract of land or any part of it—that is, any claim for the land—except that of the heirs or legal representatives of said Francisco Garcia de Noriega and Jose Antonio Garcia de Noriega?

42 A. I know of none such. There is a grant for the land adjoining this tract, but I have never heard that those claiming under it allege title to any portion of the tract now in investigation.

Q. Have you seen the original title papers for this land, and would you recognize them if now produced?

A. I have seen the original grant, and I believe I would recognize the muniments if I again saw them.

Q. Please examine the papers now shown you and state if they are, in your opinion, the same you refer to.

(Here were shown to the witness the papers in the claim, marked "A" and "B.")

A. The papers presented to me for examination and which I have inspected are the same I referred to, and I am satisfied that they are the same papers which make and constitute the sufficient, good, and valid grant for this said tract of land.

Q. Where did you see these muniments and at what time or times?

A. I saw them, I think, in the year 1840 in the hands of Nerio Montoya, a grandson of the grantee, Antonio Garcia de Noriega. I learned and have always understood that at the demise of the grantee Francisco these papers remained in the possession and keeping of the surviving grantee, his brother Antonio, and that at the death of the latter they passed into the hands and keeping of said Nerio, his grandson, who had lived with him until he died, and in whose hands I saw the papers, as stated. The papers, I understand, have always remained in the possession of the family or families of the grantees, until now I find them in possession of the Government at the surveyor general's office.

43 Q. What interest, if any, have you in the land here in investigation and here claimed?

A. I have an interest in the land as a great-grandson of the grantee, Francisco Garcia de Noriega.

SANTIAGO GARCIA Y MONTOYA.

Sworn to and subscribed before me this January 7, 1880.

HENRY M. ATKINSON,
Surveyor General.

NERIO ANTONIO MONTOYA, being by the surveyor general duly sworn, on his oath declares:

Question by Mr. CHAVEZ. What is your name, age, occupation, and place of residence?

Answer. My name is Nerio Antonio Montoya; my age is 73 years; my occupation is farmer, and my residence is at Nacimiento, in the county of Bernalillo.

Q. Do you know a tract of land known as and called the Canon de San Diego tract in this territory?

A. I know a place so called.

Q. Where is it situate and what are the boundaries of that tract, if you know them?

A. The place I mean lies in the county of Bernalillo, north of the Indian Pueblo of Jemez and on the San Diego river, on both its sides. The boundaries of the tract are, on the north, the Salto del Agua or waterfall; on the east, the top of the mesa forming the Canon de San Diego; on the west, the top of the mesa forming said Cañon on that side, and, on the south, the junction of the Rivers Guadalupe and San Diego and the lands of the Indian Pueblo of Jemez.

44 Q. How long have you been aequainted with the tract you have just described?

A. From and after the year 1822, when I went to live upon that land, and I have lived upon or near the tract ever since until October of last year, when I removed to my present residence at Nacimiento.

Q. To whom is said tract of land reputed to belong?

A. To us, the heirs of the original grantees of the land, Francisco and Antonio Garcia de Noriega.

Q. Did you know either of these original grantees?

A. I knew one, Antonio Garcia, who was my grandfather, and he lived at the mouth of the cañon near the said junction of the two rivers.

Q. Do you know whether there is any claim conflicting with this one for this tract? And, if so, state what it is.

A. I know of none such.

Q. Have the Indians of the Pueblo of Jemez, so far as you know, ever claimed any portion of the land claimed by the heirs of said Garcia de Noriega under this grant?

A. They never have, so far as I am aware or have ever heard, and if they had so claimed I am sure I would have known of it from my grandfather, Antonio Garcia de Noriega.

Q. Have the grantees or heirs or representatives of the grantees of the other grant of the same name contiguous to this ever, so far as you know, claimed any portion of the land you have described under their grant?

A. No such claim has ever been alleged, so far as I have ever heard, the two grants being distinct and separate, as appears
45 from the grants themselves, and they have always been so regarded and treated by those claiming under them respectively and by the adjoining Indians of the pueblo and the community generally and individual settlers. The grant for the land I have described in the senior of the other, and is within the latter, but unaffected by it.

Q. Have you ever seen the original grant papers for the land you describe? If so, when and where?

A. I have, and they have been in my possession and keeping since the death of my said grandfather—that is to say, on his death they passed into the possession of my mother, with whom I lived and who was his daughter, named Maria Rita Garcia de Noriega, and when she died, in the year 1852, residing at the time of her death upon this tract, where she had lived since 1822, they passed into my possession, and were in my possession until in the month of June last, when I delivered them to my first cousin, Captain Agustin del Valle, with the understanding that he should file them here with the United States surveyor general for approval and confirmation by the Government. The papers have always been in the possession and keeping, until filed here in the office, of our family, and have never been in the hands of any other parties.

Q. Would you recognize the original papers you have just referred to were you to see them again?

A. I am sure I would.

Q. Please examine the papers now shown you for your inspection, marked "A" and "B," and state whether or not they are the same you have referred to.

(Here were produced from the claim in question, file No.
46 128 in the office, the papers marked "A" and "B," and they were examined by the witness, who answered:)

A. They are the identical papers I have mentioned and referred to.

Q. Have you any interest in this land and what interest have you therein, if any?

A. I have an interest as the grandson of one of the original grantees, Jose Antonio Garcia de Noriega, and I have improvements upon the tract and have for years cultivated a portion of the tract until in October last I removed to my present residence, at Nacimiento.

Question by the surveyor general. How old were you when your grandfather, Jose Antonio Garcia de Noriega, died?

Answer. I cannot say; I was some 48 years of age, probably.

Q. What was your father's name?

A. Manuel Montoya.

Q. Did you ever see these papers in the possession of your grandfather?

A. I have. My grandfather not knowing how to read and I knowing, he sometimes called me to read the papers to him.

Q. How do you know these to be the same papers?

A. Because I recognize them, which I do from the signatures they bear and the writing they are in and from my familiarity with them from often seeing and handling them when in my grandfather's possession and afterwards in my own.

Q. Did you know Francisco Garcia de Noriega, the other grantee in this case?

A. I did not know him. I was very young when he was killed by the Apache Indians.

NERIO A. MONTOYA.

47 Subscribed and sworn to before me this January 22, 1880.

HENRY M. ATKINSON.
Surveyor General.

48 AGUSTIN DEL VALLE, being by the surveyor general duly sworn, on his oath declares:

Question by Mr. CHAVEZ. What is your name, age, occupation, and residence?

Answer. My name is Agustin del Valle; my age is 48 years; my occupation is carpenter, and my residence is the town of Bernalillo, in Bernalillo county.

Q. Please examine the papers now handed you and state whether they are the same you handed Mr. Chavez, as attorney in this case, for the grant claimants; and, if they are the same, state when and how they came into your possession.

(Here were produced from file No. 128, the claim in the surveyor general's office, the papers marked "A" and "B" and handed the witness for inspection, who answered:)

A. They are the same papers, as I recognize from their appearance and especially from my writing in pencil upon them. They came into my possession about the end of June or beginning of July last, when I was at the house of Nerio A. Montoya, at Nacimiento, who delivered them to me to be filed here at the surveyor general's office for the action of the Government on the claim they evidence, and I delivered them to Mr. Chavez for that purpose.

AGUSTIN DEL VALLE.

Subscribed and sworn to before me this January 22, 1880.

HENRY M. ATKINSON,
Surveyor General.

49 [Endorsed:] Canon San Diego. Testimony before sur. gen.

(Here follow maps marked pp. 50 & 51.)

52 In the Court of Private Land Claims.

AMADO CHAVES *et al.*
vs.
THE UNITED STATES *et al.*

Opinion of the Court by Associate Justice Sluss.

AUGUST 14, 1893.

The petitioners claim a tract of land known as Canon de San Diego, and allege that their title thereto is of the class known as complete and perfect.

Confirmation of the claim by this court is resisted on the ground that the title set up by the petitioners was not a complete and perfect one, and was voluntarily abandoned by the original grantees. The record shows that Francisco Garcia and Jose Antonio Garcia presented their petition in the usual form to the governor of the province of New Mexico praying for the grant of Canon de San Diego for cultivation and pasturing; that on the 27th day of January, 1788, the governor made the usual concession of the land solicited for cultivation and working and directing the al-
53 calde, Don Armenta, to place them in possession; that on February 6th, 1788, the alcalde placed them in possession with the usual ceremonies prescribing the boundaries of the tract, which is described as being in the Canon de San Diego from the junction of the San Diego with the Guadalupe on the south to the point known as the waterfall on the north.

The archive evidence tends to show that the Garcias occupied the tract and did cultivate upon it.

There is no evidence from which any opinion can be formed as

to when the Garcias commenced their occupancy nor as to the length of time during which they continued to cultivate any part of the tract. The law of Spain at the time this concession was made required that the land should be actually occupied by the grantees and should be cultivated for the period of four years as conditions of obtaining the legal title to the property. It was also required that proof should be made to the audencia of the district of the fact of compliance with this law, and that the grant should be confirmed by the audencia before the title should pass from the Crown. The evidence before the court contains no hint that the Garcias cultivated any part of the tract for the required period or that any proof of such cultivation had been made or that the grant had been confirmed by any officer or body having authority
54 in such matters. On the contrary, the evidence in the case tends to show that up to 1808 the grant had not been confirmed. Where a petitioner asserts that a title under which he claims land in this court is a complete and perfect one we think the burden is upon him to show affirmatively the happening of those matters which are necessary prerequisites to the existence of a complete and perfect title, and in the entire absence of such proof we are compelled to hold that the title shown in this case was incomplete.

The next and more material question is whether the Garcias had abandoned their right to the land under the grant mentioned, so as to deprive their successors of the right to have their claim to the land confirmed by the court.

It appears in the evidence that the Garcias in 1798 joined with eighteen other persons in a petition to the governor of the province, asking for a grant of land lying in the Canon de San Diego and extending from the boundary of the lands of the Indians of the Jemez pueblo to the Vallecito de la Cueva on the north, and that the land described by the boundaries specified in the petition necessarily embraced the lands described in the first grant to the Garcias. On March 6, 1798, the governor endorsed an order on this petition, in substance, that, in view of the foregoing petition
55 in regard to the settling in the Canon de San Diego de Jemez, where the interpreter of the Navajo nation were temporarily stationed, he granted the aforesaid land with the express condition that it should be settled by at least twenty citizens and the land should be distributed in equal parts. He further provided that the land should not be subject to alienation, but that it should belong to the grantees and their heirs in direct line, and that if any one should go away from the tract he should lose his right therein.

7

On March 14, 1898, the usual possession was given by the same Alcalde de Armenta, whose report is in substance as follows:

"In the Canon de San Diego de los Jemez, being at the aforementioned place, I having summoned the natives of the Pueblo of Jemez and having measured off a league belonging to them, I found a surplus — 2,100 varas, which they had before arriving at the cañon, which they claim, but without right. I proceeded to the surplus lands, and, finding no better title, all the petitioners being present

and well informed of the matter, I took them by the hand and walked over said land, and they pulled up grass, &c., in proof of legal possession, which they received quietly and peaceably without any opposition whatever, because after concluding with all these ceremonies I delivered to each one of said settlers three hundred varas, with which they were satisfied, leaving the remainder for the benefit of all. The boundaries are, on the north the Vallecito de la Cueva, on the south the termination of the Indian league, on the east the boundary of the Vallecito, on the west the Rito de la Jara, and, no injury resulting to any one, they were all satisfied."

At the time of the giving this possession and arrangement was entered into between the Garcias on one side and their eighteen co-grantees on the other. It seems to have been entered into with some formality in the presence of the alcalde, who made a
56 certificate of the fact. His statement of it is in substance: "At the Canon de San Diego de Jemez, there being assembled all the citizens who took possession in said cañon, the Garcias declared in a loud voice, and they all unanimously agreed to abide by what was said by the Garcias, and their reasons were these: Friends and brothers, now each one of you is about to take the lands which His Majesty has granted and donated to you, but you are all notified which we first and in our first grant have been possessing, we are going to enjoy them fully, without any of those present or their successors having the right to interpose abstracts, because as first possessors we have the right to enjoy said land and to cultivate them with full title, etc.

"The Garcias having spoken, all unanimously replied that they asked what was just, and that neither by themselves nor by their successors should there be any suit or demand brought against them, and should any one interpose such suit they would themselves defend it, and that it was no imposition upon them that the Garcias should enjoy the lands which they were heretofore cultivating."

It appears that on December 1, 1808, Alcalde Veraga addressed to the governor a letter, in which he stated in substance: "Antonio Garcia has presented to me a grant document executed by
57 De Armenta under decree of Concha, and the whole of the Jemez canon having been settled under an order by Governor Chacon made to them, in which is embraced the land granted to the Garcias, and the latter grantees alleging title to all the land, and I deeming that the title of the Garcias is founded in law, he having been the prior settler for ten years, with the condition that at the time they were given possession all the new settlers gave their consent, as appears by document which I enclose with the grant, so that after seeing same you may direct what you deem proper, and if Garcia has a better right to the land claimed may confirm the same to obviate all question which will result if the latter be not decided by you, by decreeing whether the land of the Garcias is included in the grant to the last settlers." On December 13, 1808, the governor replied in substance: "The subject does not require any decision of mine, inasmuch as the possession of the

Garcias makes their right clear, which possession, being the older, always has the preference. If the said new settlers do not coincide you will not permit resource for any such which they possess; they will have to go to the royal audencia at Guadalajara; as the documents referred to were sanctioned by the former governor, the said royal audencia alone can annul them."

58 Upon this record it is contended by the defence that the Garcias surrendered and abandoned all claim to the lands under the grant of 1788, and elected to accept in lieu thereof their proposition and share under the latter and larger grant of 1798, which they received along with their cograntees at the time of the giving of possession under the latter grant.

In opposition to this view it is contended by the petitioners that it was never intended by the Garcias nor by their cograntees nor by the governor nor by the alcalde that the grant of 1798 should embrace and operate as a conveyance of the land described in the grant of 1788.

There are many considerations apparent upon the face of the record bearing upon this question.

The petition for the grant — 1798, signed by the two Garcias, described the land petitioned for by specific known natural boundaries, and as being situated in the Canon de San Diego, adjoining the boundaries of the lands of the Indians. There was no exception or reservation of the land described in the former grant to the Garcias. The boundaries specified clearly embraced the Garcia tract. The south boundary was south of it, the — boundary north of it, the east boundary east of it, and the west boundary west of it.

59 Looking at the face of the petition, then the governor was justified in regarding it as in the nature of a request to him on the part of the Garcias to make to the twenty petitioners a grant of the whole tract within the boundaries specified, and as an offer of release of all claim to any part of the land by virtue of the grant of 1788. This consideration may explain the peculiar language used in the order making the grant. He says, "In view of the foregoing petition in regard to settling in the Canon de San Diego where the interpreters of the Navajos were temporarily stationed, I grant the aforesaid lands with the express condition that it be settled by at least twenty citizens, and the lands are to be distributed in equal parts." This seems to show that the central feature of the grant was the exact land which had theretofore been occupied by the Garcias in the Cañon de San Diego. It also seems to indicate the consideration moving the Garcias to surrender their former claim and enter into the new arrangement; and more clearly than anything else it shows that all parties understood that the particular tract — formerly occupied by the twenty citizens, and that the land was to be distributed in equal parts among the twenty citizens, including the two Garcias. In determining this

60 question we must also consider what took place at the giving possession by the alcalde.

He placed the twenty petitioners, including the Garcias, in pos-

session and distributed to each three hundred varas of land, leaving the remainder to be held in common. It was suggested in argument that the distribution of the three hundred varas to each of the petitioners was not of any of the lands in the Cañon de San Diego, but was of the surplus lands taking from the Indians and land lying in the valley of the Guadalupe. There *was* six thousand varas distributed, and there were but twenty-one thousand in the Indian surplus, and the remainder must have been in the Cañon de San Diego or in the Cañon de Guadalupe. The agreement entered into betw-en the Garcias and their cograntees shows that the twenty citizens took possession in the Canon de San Diego. The letter of Vegara to the governor shows that the whole of the Canon de San Diego was settled under the grant of 1798, and in all the record the Cañon de Guadalupe is nowhere mentioned. So, therefore, we are not at liberty to entertain any doubt that the land in the Canon de San Diego covered by the former grant to the Garcias was a portion of the land actually distributed on that occasion. It is suggested that the agreement between the Garcias and their cograntees before the alcalde had the effect to *accept* the land covered by the former grant from
61 the operation of the grant of 1798. It is proper to construe this document in the light of the petition for the new grant and the alcalde's report of giving the possession and of what took place immediately after the agreement was made. In the light of these matters it reasonably bears the construction that it was made in pursuance of an original understanding that a colony of twenty persons should be formed, of which the two Garcias should be members, to settle in the Cañon de San Diego; that the Garcias should surrender all claim under the grant of 1788 and accept their proposition of the new grant with the new settlers here and share and share alike, and that they accepted the agreement with their cograntees as a grantee that — any distribution of the land which might be made the allotment of their part would be located so as to cover the particular portion which they had heretofore been cultivating.

It was made on the occasion of giving the possession, and probably immediately preceding that ceremony. It serves to explain the significant language of the alcalde in his report, wherein, stating the fact of giving the possession, he says, "which they received quietly and peaceably and without any opposition whatever,
62 because, after concluding with all these ceremonies, I delivered to each one of the settlers three hundred varas, with which they were well satisfied." This giving possession by the alcalde was a judicial proceeding to which the Garcias were parties in interest. They were present participating in the proceedings for the purpose of protecting their rights in the property.

By accepting their allotment they became parties to the official action of the alcalde, as shown by the report, and by which they were bound, and the report shows that while under their former rights they might have opposed the giving possession, they did not do so, as is shown by the fact that they each accepted the 300 varas as their equal part, in compliance with the terms of the grant and

with the terms of their contract and to their entire satisfaction. The suggestion may occur to the mind that, as the petition asked for the "vacant and uncultivated" land, this operated as a reservation of the land covered by the first grant from the second grant.

If this was the understanding of the Garcias themselves, why did they require the contract from their cograntees guaranteeing in the distribution to them the particular part they had cultivated, and why did they permit the new settlers to take possession of the whole of the cañon under the second grant, and why did they accept the
63 three hundred varas as their part in the distribution? The facts are absolutely irreconcilable with the theory that they ever thought of a reservation of the tract covered by the first grant. It is contended that the correspondence between Vegara and the governor amounts to a judicial determination that the Garcias held the paramount title to the land covered by their first grant. We do not so construe it. It was not a judicial proceeding or decision in any sense. The governor did not profess to act judicially. He expressly states that the power to affect these grants was not vested in him. He gave the opinion as to which had the better right to the land which the Garcias had been possessing, but he did not pretend to judicially decide it. There was no hearing, no notice to the settlers, and no knowledge on their part of what was being done. All that appears is that ten years after the whole of the land had been settled by the grantees under the second grant Garcia went privately to the alcalde with his documents, stating that his rights were invaded. The alcalde forwarded the documents and the statement to the governor. The governor expressed the opinion that the Garcias had a better right to the land they had been possessing. To say that such a proceeding was a judicial determination affecting property rights, was binding upon the Crown or any one else, would be an imputation upon Spanish justice and Spanish law.

64 The governor may have been the supreme judicial officer of the province, but he was bound by rules of judicial procedure and had no power to affect property rights without a hearing, and in this instance he did not pretend to do so. His opinion that the prior grant gave a better right is what ours would have been, were it not for the manner in which the second grant was petitioned for, executed, and accepted, all which he seems to have overlooked. On the whole case we cannot escape the conclusion that the Garcias, under whom claimants derive title, have voluntarily abandoned all claim under the grant of 1788, which is the basis of this proceeding, and the petition will therefore be dismissed. In this decision the chief justice and Associate Justice Fuller concur.

65 UNITED STATES OF AMERICA:

In the Court of Private Land Claims, Santa Fé District, 1893.

AMADO CHAVES *et al.*, Plaintiffs,
vs.
THE UNITED STATES *et al.*, Defendants. } No. 100.

Mr. Justice STONE:

I fully concur with Mr. Justice Murray in his conclusions and for the same reasons which he has so clearly set forth. I wish to add only a few words touching the point of the implied relinquishment of their title by the first grantees.

One of the principle grounds upon which the opinion of the majority of the court seems to rest is the assumption that in procuring the junior grant the conduct of the grantees of the senior grant—the part they took therein—implies an abandonment
66 or relinquishment on their part of their title under the senior grant and an assent to a kind of merger of said title into that of the junior grant. Indeed, such assumption seems necessary in order to set the older title out of the way of the younger.

I am unable to perceive how such an implication can be held to arise out of the acts of said original grantees under the facts and circumstances presented. The proceedings at the time of giving juridical possession under the last grant, as recited in the document prepared by the alcalde at the time, disclose the fact that not only did the first grantees protest against any such relinquishment, but that the others of the second grantees expressly assented to the assertion of title by the two Garcias to their first grant and their exclusive retention of the same.

These facts are utterly repugnant to any implication of relinquishment.

The fact that the first grantees were copetitioners for the second grant raises no necessary implication of relinquishment of their older title.

They may well have desired more settlers surrounding their own possessions, and hence cheerfully became copetitioners for and co-grantees of an additional area of adjoining land.

67 Another fact should not be lost sight of. The estates conferred by these two grants were distinctly different. The first was a grant of absolute title to the land in fee to the grantees. The second granted in effect at most a life estate merely; less than this, it coupled a condition of forfeiture upon removal from the land during lifetime of each possessor, thus granting a mere possessory right; hence the supposition that these two older grantees voluntarily relinquished an absolute title to lands of which they had held in undisputed possession for ten years in exchange for a twentieth interest to each in a conditional possessory life estate under the second grant appears to me wholly without motive, adequate consideration, or reasonable ground of conduct in the ordinary transactions of mankind.

It seems clear to my mind that these two grants were, and were

intended and understood to be, two separate and distinct grants, with separate and different titles, estates, and grantees, neither depending upon nor affecting the other.

That the latter grant includes the earlier in its boundaries—that is to say, surrounds it—signifies no more than a topographical accident, a circumstance which of itself could not operate to merge or include the title of the first grant to any other greater extent than if the land adjoining the first grant on the east had been
68 granted as was the junior grant—afterwards the land on the north, then the west, and finally the south—and in that way included or surrounded the first tract; that the last petitioners wanted the surplus lands on all sides of the first grant is evident, and that they acquired an inalienable title or estate for life therein, distinct from the former grant, clearly intended and well understood at the time, appears to me equally evident.

Hence I regard these two grants as altogether separate and distinct and not intended to conflict with each other in any way in respect of title.

69 U. S. Court of Private Land Claims.

AMADO CHAVES *et al.*, Plaintiffs,
vs.
THE UNITED STATES *et al.*, Defendants. } No. 100. "Canon de San Diego Grant."

Dissenting Opinion by Mr. Justice Murray, Concurred in by Mr. Justice Stone.

This suit is brought under the provisions of section eight (8) of the act of Congress approved March 3, 1891. The petitioners ask for a confirmation of what is known as the Canon de San Diego grant. The grant covers 9,752 acres of land in Bernalillo county, Territory of New Mexico.

The grant was made to Francisco Garcia de Noriega and Antonio Garcia de Noriega on the 27th day of January, 1788, by Fernando de la Concha, then military governor of the province, now Territory, of New Mexico. The record evidence offer- to establish the validity of the grant — as follows:

"Your excellency Governor Fernando de la Concha:

We, Francisco Garcia de Noriega and Jose Antonio Garcia de Noriega, with the highest respect appear before your excellency and state, sir, that there being a cañon which they call Canon de San Diego vacant, and, having observed that cultivation and the pasturing of a few animals can be had therein, we place ourselves at the royal feet of your excellency's highness only to ask and supplicate that you deign in the name of His Majesty to favor us by granting to us the said cañon, and, we desiring that e-d, as we lack land for pasturing, and, we deserving that His Majesty favor us, we ask as a

grant said cañon, in consideration of which we ask and pray that what we request be done, as by doing so we shall receive great benefit and grace, etc.

FRANCISCO GARCIA DE NORIEGA.
JOSE ANT'O GARCIA.

70 SANTA FÉ, *January* 27, 1788.

I grant in the name of the King, for cultivation and working, the land that the petitioners solicit, the chief alcalde of the fueres, Don Antonio Armenta, placing them in possession thereof, provided that no prejudice whatever results to the Indians or to any of the citizens settled in that vicinity; and, this being done, he will at the end of this decree place the said act of possession, without injury to any third party, to be copied in the government book and written on stamped paper when it reaches this province.

CONCHA.

In this Canon de San Diego, on the sixth day of the month of February, seventeen hundred and eighty-eight, I, Antonio de Armenta, chief alcalde and war captain of the jurisdiction of the queros by virtue of the power in me conferred by his excellency Fernando de la Concha, knight commander de Mora in the order of Santiago, lieutenant colonel of the royal armies, civil and military governor of this province of New Mexico, being in said cañon with notification to the natives of the Pueblo of Jemes, who are adjoining said land, and having designated to them what was their own they remained well satisfied, as they did not receive any prejudice in that the said cañon be granted, and also knowing that it is the will of our sovereign that his lands be settled by his subjects in what may be vacant, and finding no impediment whatever which might interfere in doing so, and exercising the power which is on me conferred, proceeded to said Canon de San Diego, and there appearing none having a better right, and there being no prejudice to any third party who might appear to make objection, and said Indians, Francisco Garcia de Noriega, interpreter for the Navajos, and his brother Jose Antonio Garcia de Noriega being present, and they understanding all, I took them by the hand and led them over the land, pulled up grass and threw stones to the four winds, and we all *in solidum* shouted three times 'Long live the King our lord' (whom may God preserve) in sign of true possession, which they took quietly and peaceable without any objection, its boundaries being the following: On the north side the water leap (*salto del agua*) on the south side the junction of the rivers, and also a point of a red mesa and the lands of said Indians, and with respect to from east to west there are only some very high mesas on both sides of the cañon, and these serve as boundaries; and, no injury whatever resulting, they — satisfied with the same; and that it may so appear I, the said chief alcalde Antonio de Armenta signed this together with the witnesses (two) of my attendance, with whom I

act for the want of a public or royal notary, there being none of any kind in this jurisdiction, to all of which I certify.

Rio interlined, valid.

ANTONIO DE ARMENTA. [RUBRIC.]

Witness: SALVADOR ANTONIO SANDOVAL.
Witness: NICOLAS ORTIZ."

It appears that in the year 1788 the two Garcias, together with eighteen (18) other persons, petitioned the governor for a quantity of vacant land and the boundaries called for embraced about 116,000 acres and included the land granted theretofore to the Garcias.

71 The petition for the second grant, decree, and act of possession are as follows:

To the lieutenant colonel and governor of this province:

Francisco and Antonio Garcia, brothers, and interpreters of the Navajo nation, in unison with Miguel Garcia, Joaquin Montoya, Salvador Garcia, Jose Manuel Garcia, Juan Jose Gutierez, Juan de Aguilar, Blas Nepumuceno Garcia, Bartholomew Montoya, Jose Montoya, Tomas Montoya, Juan Domingo Martin, Jose Gonzales, Salvador Lopes, Antonio Abad Garcia, Miguel Gallego, Marcos Apodaca, Jose Miguel Duran, and Jose Maria Jaramillo, appear before your excellency in the most approved manner the law requires and may be necessary, and state that a quantity of vacant and uncultivated land lies in the Canon of San Diego, adjoining the boundaries of the land belonging to the Indians of the town of Jemez; and whereas the settlement thereof would be beneficial to the provinces, and advantageous to our present families and descendants to be setting upon these lands with our property and cultivating the same, we pray your excellency to be pleased to grant this aid and settlement that we petition for to the persons herein mentioned; being pleased at the same time to order, in the name of His Majesty (whom may God preserve), that we may receive from the boundaries beyond the land granted to the Indians of the pueblo, our petition calling for from east to west to the middle arroyo called Los Torreones, and the line running from north to south to the Vallecelo de la Cueva which is in front of the waterfall, and in a cross-verse line from said middle arroyo to the Rito de la Jara. We also protest that we will not injure with our persons or stock, a few trees which the Indians claim as their own, although they are planted beyond the limits of the lands which belong to them. Therefrore we humbly pray your excellency to be pleased to order our request to be complied with, granting us the vacant land asked for; by doing which we will receive grace, and we swear, in due form, that our petition is not made through malice; and one signed, the others not knowing how.

JOSE MIGUEL GARCIA.

Decree.

In view of the foregoing petition made by Jose Miguel Garcia and other citizens therein mentioned, in regard to settling in the cañon known as San Diego de Jemez, where the interpreters of the Navajo nation were temporarily stationed, I grant to them the aforesaid land in the name of the King, our sovereign, with the expressed condition that it is to be settled by at least twenty citizens; that the lands are to be distributed in equal parts, and that they are not allowed or authorized, for themselves or their heirs, to sell or dispose of the lands granted to them. It being His Majesty's will, according to his last orders, that the lands should descend from father to son, or his heirs in a direct line; and if any colonist, to suit his own conscience, should desire to remove, under any pretext whatever, his possession or share shall remain for the benefit of the one taking his place, in which case the residents of the same place, or persons marrying there, shall be preferred, and for which no remuneration whatever shall be exacted by the person voluntarily absenting himself, or expelled or banished by the au-
72 thorities on account of his bad conduct; that besides the subdivision above mentioned, a sufficient amount of land is to be left for pastures and watering places as well as to allow for the increase of the settlement, if such may be the case (which is likely to occur)—(torn)—order of the chief justice of that jurisdiction, Don Antonio Armenta, to place the parties in possession under the rules prescribed by law.

CHACON.

Possession.

In the Canon de San Diego de los Jemez, on the fourteenth day of the month of March, in the year one thousand seven hundred and ninety-eight, I, Don Antonio Armenta, chief justice of the Pueblo of Jemez, by virtue of the authority conferred upon me by my superior, Don Fernando Chacon, gentleman of the order of Santiago, lieutenant colonel of the royal armies, political and military governor of this province of New Mexico, being at the aforesaid place, and having summoned the natives of said Pueblo of Jemez, to whom having measured the league belonging to them, I found a surplus of two thousand one hundred varas, which they had before arriving at the Canon de San Diego, all of which they claimed as their own, without having any right to them in any manner; and believing that it is the wish of our sovereign that his land be settled upon by his subjects wherever a surplus may be found, and finding no impediment whatever, and using the authority in me vested, I proceeded to the surplus lands, and finding no one with a better title, and Francisco Garcia, Antonio Garcia, Navajo interpreters, Miguel Garcia, Joaquin Montoya, Salvador Garcia, Jose Manuel Garcia, Juan Jose Gutierrez, Juan de Aguilar, Juan Blas Pumuceno Garcia, Bartolome Montes, Tomas Montoya, Jose Montoya, Juan Domingo Sangil, Salvador Lopez, Jose Gonzales, Antonio Abad Garcia,

Miguel Gallegos, Marcos Apodaca, Jose Miguel Duran, and Jose Jaramillo, being present, all interested and well informed in regard to the matter, I took them by the hand, walked them over said lands, they pulled up grass, threw stones towards the four winds, and we all cried at once, three times, Live the King our sovereign (whom may God preserve) in proof of legal possession, which they received quietly and peaceable without any opposition whatever, because, after concluding all these ceremonies, I delivered to each one of the said settlers three hundred varas, with which they were well satisfied, leaving the remainder for the benefit of all, and without any other lands being left for any person to enter; and in order to prevent any other from coming to meddle and create difficulties between the citizens, as well as the Indians, I gave time to understand which were their boundaries, which are: On the north, the Vallecito de la Cueva, on the south the termination of the Indian league. On the east, the boundary of Vallecito; and on the west, the opening towards the middle arroyo and the Rito de la Jara; and no injury resulting to any one they were all satisfied, and in order that it may so appear, I, the said chief justice, signed with my two attending witnesses in the absence of a public or royal notary, there being none within in the limits of all this government, to which I certify.

ANTONIO DE ARMENTA.

Witnesses:
SALVADOR LOPEZ.
JOSE MIGUEL GARCIA.

73 It appears that on the day juridical possession was given under the junior grant as to what effect the junior grant had on the rights of the Garcias to the land in that grant as was included within these boundaries. In order to settle the question, the following certificate was prepared and signed by the alcalde:

"In the Canon de San Diego de Jemez on the fourteenth day of the month of March, year 1798, before me, Antonio de Armenta, and there being assembled all the citizens who took possession of the said cañon, together with Francisco Garcia de Noriega and Antonio Garcia de Novega, two brothers of the first possessors, said Garcias declared in a loud and clear voice, which all heard, because they shoutted it with much distinctness, and they all unanimously agreed to abide by what was said by the said Garcias, and their reasons were these. Friends and brothers, now each of you is about to take the lands, which His Majesty has granted and donated to you; but you are all notified that the lands, which we first and in our first grant, we have been possessing, be all of you aware that I, and my brother are going to enjoy the same freely, without any of those present, nor their children nor anybody else shall desire to interpose obstacles, and because as first possessors we have the right to enjoy said lands and to cultivate them with fully title, as well ourselves, our children and our successors; and so that none of those who are present may plead ignorance we have so spoken today there being no one absent. The said Garcias having made all the

remarks, all unanimously replied that they asked reasonable justice and that neither by themselves, their children, nor successors would there be interposed any suit or demand against them at any time, and if they perchance should wish to do so they would take the case until leaving them in peace concerning the said land which they had been so justly possessing.

All here set forth I, said chief justice, witness, for all of the citizens declared that it was not to them any imposition that the Messrs. Garcias should enjoy the lands which they were heretofore cultivating, and that it may so appear whenever requisite I will make this document in favor of the said two Garcias, I sign the same with those of my attendance in the aforesaid cañon in said day, month, and year, to which I certify.

ANTO. DE ARMENTA."

It also appears that in the year 1808 another controversy arose between one of the Garcias and some of the grantees under the junior grant as to their respective rights under the two grants. This matter was referred to the alcalde of that jurisdiction by one of the Garcias. The alcalde examined the grant to the Garcias and the certificate of the alcalde who had placed the grantees in possession under the junior grant and came to the conclusion that
74 the Garcias had the better title, but referred the whole matter to the governor for his decision in a letter dated December first, 1808; which letter is as follows:

"Governor:

The interpreter of the Navajos, Antonio Garcia, has presented to me a document executed to him by the former alcalde of this jurisdiction, Antonio de Armenta, under the decree of Don Fernando de la Concha, as appears from the grant itself, and the whole of the Jemez cañon, having been settled under an order of Don Fernando Chacon in a royal grant made to them and in which it embraced the lands granted to the Garcias, whence results contention between the ones and the others the latter grantees alleging title to all the land; and I, deeming that the title claimed by Antonio Garcia is founded in law, he having been the prior settler for the period of ten years, with the condition that at the time they were given possession all the new settlers gave their consent, as said Garcia makes appear by a document which the alcalde executed to the two brothers and which I enclose to you, together with the grant of the Garcias, so that after seeing you may order whatever you shall deem proper and may, if Garcia has a right to the land claimed, confirm and approve the same, to obviate all questions which will necessarily result if the latter be no- decided by your superiorit- that the land of the Garcias is included or not in the grant of the last settlers and whether a copy of this grant be taken so that the original, which is the one I enclose, may remain in the archives of the government confirmed by you, and the same to be done with a copy, subject to what you may direct, which will be the best and most

correct, your ordering what I shall do to avoid proceedings annoying your attention. God presserve you many years.

IGNACIO SANCHEZ VERGARA.

Santa Ana, 1st of December, 1808.

Lieutenant Colonel Jose Manrique."

On the thirteenth day of December, 1808, the governor replied to the letter of the alcalde as follows:

"Advised of your official communication of the first instant and documents you accompany.

I will state to you that the subject does not require any decision of mine inasmuch as the grant of the Garcias makes their right clear, which grant being the older always has a preference. The last settlers cannot deny to the Garcias a better title and so these should always remain on the same grant which they have held hitherto; and if the said new settlers do not coincide you will not permit them recourse for and such which they may possess, they will not have the royal audience of Guadalajara, as the documents referred to were sanctioned by former governors of this province and the said royal audience alone can annul them; with which I answer your official communication before mentioned. I return to you the documents mentioned that you may deliver them to the party interested. God preserve you many years.

Santa Fé, 13th of December, 1808.

To the alcalde of Jemez."

75 The letter of the governor is not signed, but is was shown to be among the archives turned over to the United States by the officials of the Mexican government, and its genuineness is not contraveted. The petition of the Garcias, the grant and the act of possession, and the certificate of the alcalde came from the hands of descendants of the original grantees, and are no doubt genuine. The evidence shows that the grantees and their descendants have been in the actual possession of the land from the date of the grant to the present time. The junior grant was confirmed by act of Congress in 1860, and patent issued in 1880. In 1878 or 1879 the heirs of the Garcias presented a petition to the surveyor general of New Mexico, under the provisions of section eight (8) of the act of Congress approved July 22, 1854, asking a confirmation of the senior grant. It stated in the petition to the surveyor general that the junior grant was on file in his office as private land claim No. 25. After a full examination by the surveyor general he recommended the claim to Congress for confirmation. This record presents two questions to be considered by the court: First, did the grant of 1788 convey to the two Garcias a complete and perfect title to the land embraced within its boundaries, forfeited or abandoned; and, second, have their rights to the land been forfeited or abandoned? In the investigation of these questions the court is confined to the rights of the Garcias as between them and the gov-

ernment of Spain. The court has nothing to do with any equities which may exist between the claimants under the two grants. No decree that the court might render in favor of the petitioners would affect the rights of the defendants as between them and the petitioners. See sec.

A majority of the court are of the opinion that the Garcias by applying for and taking possession of land under the junior
76 grant waived and abandoned their right to claim under the senior grant, and that the grant of 1788 to the Garcias is incomplete and imperfect, and therefore the United States, holding the legal title to the land, conveyed to the defendants a perfect legal title. It is stated in the petition for the second grant that there is a quantity of vacant and uncultivated land lying in the Canon de San Diego, adjoining the land belonging to the Indians of the town of Jemez. The prayer of the petitioners is that they may be granted the vacant land asked for. There is nothing in the statement which would authorize the governor to conclude that the Garcias had abandoned their right under the grant of 1788, for the reason that the land embraced in their grant was not vacant. If all the land was vacant within the boundaries called for in the petition, why state that there was a quantity of vacant land? It would have been quite as easy to have said that the land included in the boundaries called for was vacant. The natural conclusion is that a part of the land within the boundaries asked for was not vacant.

There is nothing in the petition about the grant to the Garcias or to the lands that any other persons which might be embraced within the boundaries called for, and I do not see why there should have been, for the reason that the petitioners only asked for a quantity of vacant land, and not for lands that had been granted to others. The Garcias certainly did not forfeit any rights under their grant by joining in a petition with other persons asking for a grant to a vacant land; neither is there any statement in the petition inconsistent with the idea that others besides the Garcias owned land that was not vacant within the boundaries called for.

The record shows that there were other settlers in that
77 vicinity, and it is fair to presume that they were not living on vacant land.

That the Garcias did not intend to surrender any rights under their grant is manifest by what occurred on the day juridical possession was given under the junior grant. The certificate shows conclusively that not only the Garcias were claiming the land covered by their grant, but that the other 18 grantees under the junior grant so understood it and agreed that the claim of the Garcias was just. It will be seen from the act of juridical possession that the alcalde did not attempt to put the grantee in possession of any other than surplus or vacant lands which he found within the boundaries of the grant, but if he had it would not change the legal aspect of the case, as all the parties interested were duly advised that the Garcias did not surrender any of their rights under the grant.

The alcalde found twenty-one hundred varas of surplus land claimed by the Indians of Jamez which he decided was vacant for

the reason that the Indians had not title to it, and proceeded to put the grantees in possession of it. It is further stated by the alcalde that there was "no land left for any other person to enter;" in other words, he put in possession of the vacant lands within the boundaries of the grant, so there was none left for any other person to enter. This statement by the officer was entirely unnecessary and meaningless if all the land within the boundaries called for was vacant. The certificate of the alcalde shows beyond doubt that the land claimed by the Garcias was not vacant.

The land granted to the Garcias was not included in the second grant, although within its boundaries, and it was not intended by the granting power or the petitioners for the junior grant that it should be. The governor did not attempt to dispose of any land to the grantees under the junior grant, but only the right to live on the vacant land asked for, but the title remained in the
78 Crown. The governor had no power to give to grantees under the junior grant the land included in the grant of 1788.

21 Wall, 660.

Polk *v.* Wendell, 9 Cranch, 99; same case, 5 Wheaton, 311; Patterson *v.* Winn, 11 Wheaton, 383–'4; Winter *v.* Cramelin, 18 How., 88; Reichart *v.* Phelps, 6 Wall., 165; Minnesota *v.* Bachelder, 1 Wall., 155; Marsh *v.* Brooks, 8 How., 232–'3; Sabiego *v.* Mavericks, 124 U. S., 124, 282–'3; Wright *v.* Roseberry, 121 U. S., 520.

This brings me to the consideration of the grant to the Garcias. The record shows on its face a complete and perfect title in them. The petition is in regular form and prays for an amount of land the boundaries of which are set out. The grant by the governor is in the name of the King. It is regular in every respect, and he grants the land "that the petitioners solicit" and directs the alcalde to put them in possession. The grant is full and complete and without any condition whatever. In obedience to the order of the governor, they were put in juridical possession of the "land asked for." The record and other evidence of the case show that the grantees have been in possession of the land for more than a century, and that is not all. The record further shows that the question of their title was passed upon in 1808 by the governor, who made the junior grant and who ought to have known whether or not he believed that the Garcias had abandoned their rights under the senior grant by joining in the petition for the junior one, and whether or not that fact was potential in inducing him to make the second grant. The record shows that a controversy arose among the parties interested in the two grants as to the rights of the Garcias under the grant of 1788. The matter was referred to the alcalde (who was the judicial officer for that jurisdiction) by one of the Garcias. He examined the grant of 1788 and the certificate made by the alcalde who delivered possession under the junior grant and came to the conclusion that the Garcias had the better title,
79 but he deemed it best to have the matter settled by the governor for reasons set out by him in a letter to the governor

in 1808. It is important to notice that one of the questions to b passed upon by the governor was *to* whether or not the land in cluded in the grant to the Garcias was included in the junior grant The governor, with all the facts before him, replied to the letter o the alcalde as follows:

"Advised of your official communication of the first instant and documents you accompany.

I will state to you that the subject does not require any decision of mine inasmuch as the grant of the Garcias makes their right clear, which grant being the older, always has the preference.

The last settlers cannot deny to the Garcias the better title, and so these should always remain on the same grant, which they have held hitherto; and if the said new settlers do not coincide you will not permit to them recourse; for any such which they may possess, they will not have the royal audience of Guadalajara, as the documents referred to were sanctioned by former governors of this province and the said royal audience alone can annul them; with which I answer your official communication aforementioned.

I return to you the documents mentioned that you may deliver them to the party interested.

God preserve you many years.

Santa Fé, 13th December, 1808.

To the alcalde of Jemez."

The governor in effect said that the question as to the rights of the Garcias was to- well settled to require a decision from him, but add-, "The grant of the Garcias makes their title clear, which being the oldest always has the preference." The opinion of the governor was that the title to the land embraced in the grant to the Garcias had passed out of the Crown and was not included in the junior grant, for he said to the alcalde, "The last settlers cannot deny to the Garcias the better title, and so these should always remain on the same grant which *hte*y have held hitherto," showing that in the opinion of the governor the junior grant did not embrace the land belonging to the Garcias. He also directs the alcalde not to allow the Garcias to be interrupted in their possession, and tells him to inform the
80 new settlers that if they are not satisfied with his decision in that matter they must appeal to the royal audience of Guadalajara, who alone has power to annul the grant. It seems to me quite clear that the governor, with all the facts before him, held that the title of the Garcias had not been forfeited, but that the same was complete and perfect, and must remain so, unless annulled by the royal audience. The governor was the representative of the King, the court of last resort in the province, and was the sole judge of the competency and weight of evidence to be considered by him. His decision as to the title of the Garcias was conclusive on the Spanish government, and on the Mexican government who succeeded to the rights of Spain, and is also conclusive on the United States as the successors of the Republic of Mexico. The governor's decision in that case was made in the usual course of administration

of justice in the premises, and was within the scope of his authority. Therefore this court has no power to review his action in the premises.

See 1 Cranch, 170; 11 Mass., 227; 2 Peters, 167–'8; 4 Wheaton, 423; 4 Peters, 563; 12 Peters, 410.

This principle has been uniformly recognized by the supreme court of Texas in dealing with claims of title based on the official acts of the public authorities of the preceding governments of Spain or Mexico.

See 26 Texas, p. 235.

At a former term of this court in the case of Tomas Torres *et als. vs.* The United States, the United States asked for a confirmation of the Rancho del Rio Grande grant. The decision of the court was based on the recognition of the governor of New Mexico of the existance of a grant made by Governor Chacon in 1795 to the ancestors of the petitioners. The record showed that in 1837 a number of persons presented that petition to the governor, praying for
81 a grant to what was known as the Rio Grande place, and their petition was referred by the governor to the town council of Taos to investigate and report as to whether or not said land should be granted to the petitioners. The question was referred by said town council to a committee of three to investigate the matter and report. The report of the committee is as follows:

"We, the committee, charged as above stated, after having been seen and heard by the petitioners and those of San Francisco del Rancho, who are interested in the waters of the Rio Grand find that the tract which petitioners applied for was granted in the year 1795 to sundry citizens of the rancho for common pasturage; and, also, we cannot agree to the application because it is entirely to the injury of third parties."

The governor, informed of the report of said committee through the town council, made the following order:

"In view of the petition and the report of the respectable Ayuntamiento of Taos, the grant of land asked for agriculture cannot be made."

This court held that the refusal of the governor to grant the land to the petitioners was a recognition that the grant of 1795 was valid and that his decision estopped the Mexican government from denying the validity of the grant, and that the United States as the successor of the Mexican government was also estopped. I cannot reconcile the doctrine laid down in that case with the conclusion reached by the majority of the court in this one, for if the action of the governor of New Mexico in refusing to make the grant asked for by the petitioners estopped the Mexican government from denying the validity of the grant of 1795, the decision of the governor in 1808, in which he held that the grant of 1788 was not included in the grant of 1798, and that the grant to the Garcias was valid and could only be annulled by the royal audience, must estop the Spanish government from setting up any claim to the land embraced in

the grant, and, if so, the United States is also stopped. If the
82 facts disclosed in the record would not estop the Spanish from denying the validity of the grant to the Garcias in an action brought by them in the courts of Spain to recover the land, the officers of that government can do nothing by which it is bound.

In the opinion of a majority of the court in the case of Earl B. Coe *vs.* The United States I find the following laid down as the duty of this court in cases arising under Spanish and Mexican grants, which meets my hearty approval:

"Under the principle established by our supreme court in many kindred cases, we think it is not our duty to take an electric light, a microscope and tomahawk and explore the proceedings of the officials making the sale in search of technical flaws or omissions for the purpose of slashing in pieces titles to these lands upon the faith of which our citizens have invested their fortunes in the attempt to render the lands fit for cultivation. On the contrary we deem it our duty to give to these proceedings and the laws under which they were had a fair, reasonable and liberal interpretation in favor of upholding titles issued by competent authority and upon the faith of which such large sums of money have been expended."

In that case the grant was made in 1838, and if the wise and just rule invoked by the court was applicable to a transaction of such recent date, *a fortiori* it should be applied in this cause. The grantees and their descendants have been in undisturbed possession for more than one hundred years, and, while it does not appear that large sums of money have been expended by them, their rights are not to be disregarded on that account. They have endured the hardships and privations incident to a life in the frontier, continually watching and guarding their families against the almost daily attack of savages, and it is to this class of citizens that we are indebted more than any other for the benefits of civilization enjoyed by the people of this section of the country, and if these petitioners are to be turned out of their home, I submit, in the light of this record, that it will be done on a mere technicality.

83 In my opinion, the grant of 1788 conveyed to the Garcias a complete and perfect title to the land embraced within its boundaries. The grantees having been in possession of the land under the grant for more than a century, the court will conclusively presume that any subsequent conditions imposed upon them by law have been performed; but if this was not so the action of the governor in 1808 was an adjudication of the question of title and was conclusive between the grantees and the Spanish government. The grant, being in all respects complete and perfect, should be confirmed as such.

84 AUGUST 14.

The above-entitled cause having been submitted at a former day of the court and the court being fully advised in the premises, it is considered by the court that the grant be rejected and the petition

of the petitioners be, and the same is hereby, dismissed; and it is so ordered.

Justice Sluss delivered the opinion of the court, and Justices Murray and Stone each delivered a dissenting opinion.

85 AUGUST 21, 1893.

Now come the petitioners, by their attorneys of record, and pray that an appeal be allowed them from the decree herein dismissing their petition.

GEO. HILL HOWARD,
JEFFRIES & EARLE,
Attorneys for Petitioners.

Appeal allowed.
JOSEPH R. REED.

86 In the Court of Private Land Claims, Santa Fé District, August Term, 1893.

AMADO CHAVES, ROMAN BACA, and Others, Plaintiffs,
vs.
THE UNITED STATES and Others, Defendants. } No. 100.

For the Cañon de San Diego grant.

Transcript.

Appearances: Geo. H. Howard, Esq., and Wm. E. Earle, Esq., for plaintiffs; Matt. G. Reynolds, U. S. attorney; W. B. Childers, Esq., B. S. Rodey, Esq., & T. B. Catron, Esq., for defendants.

Trial commenced August 2nd, 1893.

Mr. CHILDERS: I ask leave of court to join in the answer filed by Francisco Perea, Bernard S. Rodey, and others on behalf of J. W. Miller.

Which leave was granted by the court.

Mr. EARLE: I ask leave to file another intervenor in this case.

Mr. REYNOLDS: I ask leave to reserve the right, after I have time to examine this closely, to place my objections on the record.

Which request was allowed by the court, and that space be reserved on the record for any objections the United States attorney may desire to make.

87 Miss AMANDA BOARDMAN, being first sworn, testified on behalf of the plaintiffs as follows:

Examination by Mr. EARLE:

Q. Miss Boardman, please state what your official position is.

A. I am chief clerk of the surveyor general's office and have charge of the Spanish papers.

Q. Please examine these papers and state what they are.

A. One is reported No. 25 and one 122, Cañon de San Diego grant. This paper is archive 379.

Q. This paper 379, do you — by whom that was turned over to the surveyor general?
A. I suppose it was turned over by the governor.
Q. And these other papers, what are they?
A. Two of these papers have been transferred from No. 122.
Q. They are reported numbers?
A. Yes, sir.
Q. You don't know where they came from?
A. No, sir.

Witness excused.

AMADO CHAVES, one of the plaintiffs, sworn, testified in English as follows:

Examination by Mr. EARLE:

Q. Mr. Chaves, will you state you- age, place of residence, and avocation?
A. Forty-three years; Santa Fé, New Mexico; superintendent of public instruction for the Territory.
88 Q. Are you relat*ion*ed in anywise to Francisco Garcia de Noriega or Antonio Garcia de Noriega?
A. I am a great-grandson of Francisco Garcia de Noriega.
Q. Will you trace your lin*e*age back to him, please?
A. Rose Garcia de Noriega was a daughter of Francisco Garcia de Noriega and she was my father's mother.
Q. Agustin del Valle, was he related in any way to the grantees?
A. He was a grandson of Antonio Garcia de Noriega.
Q. Roman Baca, who is he?
A. He is a grandson of Francisco Garcia de Noriega and he is a son of Luis Garcia.
Q. Who were Francisco Garcia de Noriega and Antonio Garcia de Noriega?
A. Francisco and Antonio were two Spanish brothers, who were interpreters for the Navajos and lived at the Cañon de San Diego and were owners of the tract of land known by that name.
Q. Either of them hold any other official positions?
A. Francisco Garcia was captain of militia under the Spanish government.
Q. Do you know how he died?
A. He was killed by the Navajos.
Q. Do you know anything in regard to the possession of the descendants of these two Garcias of this grant, the Cañon de San Diego?
A. I only know it as a matter of family history, not of my own knowledge.

Mr. REYNOLDS: I object to it as not proper to prove possession of property by hearsay testimony.
By the COURT: The testimony may go in, subject, however, to the objection.

A. I only know what was told me by my grandmother, who was born on the grant; she was the mother of my father; of my own personal knowledge, I don't know, as I was not born at that time, and she said the land was occupied and cultivated by them.

89 Q. You said that Agustin del Valle was a grandson of Antonio Garcia de Noriega. Do you know whether or not he possessed a part of this Cañon de San Diego grant?

A. He is the owner of the house of his grandfather and the land that belonged to his grandfather.

Mr. REYNOLDS: I object to the answer of the witness as attempting to show ownership in the property by parol.

By the COURT: Objection will be sustained.

A. He is in possession of the land that he inherited from his grandfather.

Q. Is it the same land that was held by his grandfather in his lifetime?

A. Yes, sir.

Q. How about the house?

A. It is the same house that belonged to his grandfather.

Cross-examination by Mr. RODEY:

(By Mr. CHILDERS:)

Q. What was that gentleman's name?

A. Agustin del Valle.

(By Mr. RODEY:)

Q Where does Agustin del Valle live?

A. He lives at Jicarilla, in Lincoln county.

Q. How many years has he lived there?

A. I don't know.

Q. Do you know who is in possession of this land at the present time?

A. No, sir.

Q. You are acquainted with the Jemez river, which runs through that tract?

A. I know where it is.

Q. Mr. Chaves, and do you know where the Guadalupe creek branches off from the Jemez river?

A. I know where it joins.

Q. Where is this piece of land that Agustin del Valle pos-

90 sessed with reference to where these rivers join?

A. Up from the junction of the rivers.

Q. How far up?

A. I can't tell; I have never been there but once; it was pointed out to me then.

Q. When did you first know about this grant of Cañon de San Diego?

A. I have known of it all my lifetime.

Q. When did you first see any paper purporting to be an instrument of title?

A. I cannot tell when it was.

Q. Do you know near what number of years?

A. About twelve years; I don't remember exactly; possibly not over eight years.

Q. It was presented to the surveyor general for the first time in 1881, wasn't it?

A. About that time.

Q. How long before that time had you ever heard of it?

A. I don't know; I had heard of it all my lifetime, but had not seen the papers until they were presented.

Q. Did you know that there were any papers in existence prior to that time?

A. Yes, sir; the first papers that I ever saw were handed me by Agustin del Valle.

Q. Where did he get them?

A. I don't know of my own knowledge; he told me he got them from his grandfather.

Q. Did you not know about the grant of the town of Cañon de San Diego many years before that?

A. Yes, sir.

Q. You knew about its being recommended for confirmation by the surveyor general in 1880?

A. I knew it was recommended, but I don't remember the date.

Q. Do you know why your people didn't make any objec-
91 tion to that at the time it was being considered by Congress?

Mr. EARLE: I object to the question *is* incompetent and irrelevant.

By the COURT: The objection will be sustained.

Examination suspended to allow introduction of exhibits.

Mr. EARLE: I offer Exhibit A, which is a document in the Spanish language, with translations.

Mr. REYNOLDS: I object to it for the reason that it is not shown that it is an archive, it being properly a record thereof, nor is the loss of the record shown, nor does it appear that it was ever recorded.

Mr. EARLE: Offer translation of Exhibit B and record of the surveyor general's office—proceedings of the surveyor general's office.

Mr. REYNOLDS: I object to the translation of the granting decree dated January 27, 1788; a correct translation of the part I object to will show that all that was granted was the cultivation and working of the lands.

By the COURT: These documents may all go in subject to the objections.

Mr. EARLE: I offer that paper with Exhibit B, this statement made by the alcalde who delivered juridical possession of the second grant.

Mr. REYNOLDS: I object to it, because it is signed by the alcalde alone, without any witnesses; no return thereof appears to have ever been made to the governor; no notice was given that it had

been excepted and any reservation made; that it is produced from private hands and filed in the surveyor general's office by private parties, and is not one of the archives of that office.

Also that if it should appear that this reservation was made I object to it as not being in due form, and that he had no authority to make any reservations from the orders and decree of the governor, and if he did so he exceeded his authority; that it was not subsequently ratified by being returned to and approved by the governor.

Mr. EARLE: The next paper is that of Ignacio Sanchez Vigara, dated December 1, and the answer of the governor.

Mr. REYNOLDS: I object to it as an unsigned paper, which does not purport to be executed by any one for or on behalf of the governor.

By the COURT: The papers may go in, subject to the objections.

Mr. EARLE: That letter of Vigarra and the letter purporting to be in answer to it are part of the original files in case No. 9, placed in this case by order of the surveyor general.

AMADO CHAVES, witness, on the stand—cross-examination continued.

By Mr. RODEY:

Q. You have often examined this paper purporting to be the grant of this land in question?

A. I have examined it; yes.

Q. Do you know where these boundary lines are on the ground?

A. I do not.

Q. Do you know where the north boundary is—the water-leap (salto del agua)?

A. I have had it pointed out to me.

Q. Where is that with reference to the hot spring?

A. It is above the hot springs—some distance above.

Q. About how far?

A. I have no recollection; I don't know how far; a short distance; suppose it's little over two miles.

Q. Do you know where the junction of the rivers, said to be the southern boundary, —?

A. Not of my own knowledge; I have had it pointed out to me.

Q. Is there any town or settlement at the place pointed out to you?

A. Yes—a settlement, but I don't know what it is.

Q. Do you know the name of the settlement?

A. No; I do not.

Q. Don't you know it was Cañoncito?

A. I know there was a little settlement where the Canon de San Diego joins the other.

Q. How far is this from the Indian Pueblo of Jamez?

A. I don't know.

Q. Do you know the Guadalupe creek or river?

A. No, sir; I do not, except that I had it pointed out to me. I hav'n't been there for many years.

Q. When you were down there these cañons at the junction of the rivers was pointed out to you as the southern boundary of the grant?

A. When I was down there the grant had not been surveyed.

Q. What was your object in going there?

A. I was going to the Jemez hot springs several years ago.

Q. Did you know of the existence of this grant then?

A. I do not remember. I don't remember the date.

Q. Had you ever noticed the grant previous to the time it was filed with the surveyor general, in 1879?

Mr. EARLE: Objected to as immater- and irrelevant.

Question withdrawn.

Q. How did you learn what the southern boundary of this grant was; when did you ascertain that fact?

A. I don't remember the date I ascertained it. Of my own knowledge I do not know the point. My information was from Agustin del Valle.

Q. This settlement that you speak of, is that within or without the southern line of this grant that you are claiming here?

A. I do not know.

Q. How many years ago was this that you first knew of the Jemez and Guadalupe rivers?

A. I don't remember. I have been there twice in my life. It has been ten years.

94 Q. Have you never gone out there but ten years ago?

A. No, sir.

Q. Then you don't know, of your own knowledge, any part of this grant was cultivated previous to that time, ten years ago?

A. Not of my own knowledge.

Q. You were not born on that grant, neither was your mother?

A. No, sir; but my great-grandmother on my father's side was born there.

Q. Do you know the name of the place where she was born?

A. Cañon de San Diego.

Q. Don't you know that that place was a little town or place known as Cañoncito that is at the junction of the Jemez and Guadalupe rivers, about three or four miles north of the present Indian Pueblo of Jemez?

A. I do not.

Q. Do you know of any other settlements between the Indian Pueblo of Jemez and the hot springs?

A. I do not know of any settlements.

Q. You didn't find anybody living up that cañon when you went up there ten years — claiming under this little grant?

A. I didn't stop anywhere; I went on horseback to the springs. I did see settlements in the cañon somewhere.

Q. Do you know when your grandmother left the Cañon de San Diego?

A. No, sir.
Q. Where did your grandmother spend the most of her lifetime?
A. At Cevilleta.
Q. That is about fifty miles away from this grant, is it not?
A. It is quite a distance.

Re-examination by Mr. EARLE:

Q. In what year was Francisco Garcia de Noriega killed?
A. From information derived from my father, 1807.
Q. Did you know Santiago Garcia y Montoya?
A. Yes, sir.
95 Q. Is he living or dead?
A. He is dead.
Q. Did you know Nerio Antonio Montoya?
A. I knew him, and he is dead.
Q. Do you know whether they are the same people who testified before the surveyor general?
A. Yes, sir; they testified, both of them.

Recross-examination by Mr. RODEY:

Q. Mr. Chaves, you were present before the surveyor general when this testimony *were* was taken? You were prosecuting this claim yourself.
A. Yes.
Q. Who wrote out the testimony of this man Santiago Garcia y Montoya?
A. I believe it was Mr. Miller, the chief clerk.
Q. Didn't you yourself write it?
A. No, sir.
Q. Is that not in your handwriting?
A. I don't remember; I can tell you if I did it.
Q. Look at this and see. (Original testimony shown witness.)
A. That is in the handwriting of Mr. Miller, who was chief clerk of the surveyor general at that time.
Q. Mr. Chaves, have the location of the ranches and houses of these two brothers, interpreters for the Navajos, ever been pointed out to you?
A. The ranch of Antonio Garcia de Noriega was pointed out to me by Agustin del Valle.
Q. Do you know whether that ranch is above or below the junction of the rivers or southern boundary?
A. I don't know now.
Q. You don't know the southern boundary of the ranch you now claim on the earth's surface?
A. I don't know them on the ground.
Q. Will you please tell the court when you first came into
96 possession of the muniments of title relating to this title, those you have introduced in evidence?
A. I do not remember the dates; they were brought to me by Agustin del Valle.

Q. Where is he now?
A. Lincoln.
Q. Does he know of this trial here?
A. I sent a man to inform him.
Q. Where has he lived all his life?
A. The first time I knew him he lived at Bernalillo.
Q. Do you know where he got the papers?
A. He told me he got them from his grandfather.
Q. Your information was only tradition before they were presented to the surveyor general?
A. I had never seen the papers.
Q. But you had heard your grandmother speak about it?
A. It was spoken about in our family, but I had never seen them.
Q. Do you know a woman, Chapita Montoya?
A. No, sir.

Mr. EARLE: These papers I (re)offer in evidence, Garcia and Montoya. I have read this other document before, paper given by Armenta to Garcia brothers, March 14, 1798, at the time of the giving of possession of the larger grant.
Plaintiffs rest.

97 WILL. M. TIPTON, sworn as a witness on behalf of the Government, testified as follows:

Examination by Mr. REYNOLDS:

Q. What official position do you occupy?
A. Special agent court of private land claims, appointed by the Attorney General of the United States, detailed for duty in the office of the United States attorney for this court.
Q. I will get you to state if you have formerly been employed in the surveyor general's office of this Territory.
A. Yes, sir; I have.
Q. For how long?
A. The greater portion of sixteen years.
Q. State whether or not you are familiar with the papers of that office, the Spanish and Mexican archives.
A. Yes, sir.
Q. Get you to examine document before you and state what it is.
A. This document consists of a petition by Francisco & Antonio Garcia de Noriega and a number of other parties whose names appear therein to the governor of the province of New Mexico, asking that they be granted certain lands, which are described in the petition; also——
Q. Is that of the second grant made in 1798 to the Cañon de San Diego tract?
A. Yes, sir; it is.
A. (continued). —the granting decree is dated March 6th, 1798.
Q. I will get you to state whether or not that is one of the archives of the surveyor general's office.

A. Yes, sir; it is.
Q. One of the old archives which were turned over to that office?
A. Yes, sir; archive number 375.

Mr. RODEY: I offer in evidence that document, and will read and file a translation of it.

Q. I will get you to examine this other paper (testimonio). Q. And I will get you to state what this instrument is with
98 reference to that you have just testified to as being archive number 375.
A. This document appears to be a copy of the document about which I have just testified, the copy being signed by Antonio Armenta, the same alcalde who placed the parties in possession of the grant. It bears the signatures also of two witnesses, Jose Miguel Garcia and —— Lopez, and following that is the signature of Fernando Chacon.
Q. Who is Fernando Chacon—who was he?
A. He was the governor who made this grant.
Q. Does that signature of Chacon appear to have been made after the proceedings here?
A. I don't know; it may have been. My impression is that it was made afterwards.

Mr. RODEY: I offer that document in connection with the other. I do it for the purpose of showing the regularity with which the grant was made.
Mr. REYNOLDS: I want to introduce the petition filesd for the confirmation of this grant by the surveyor general, together with the report made thereon, the act of Congress confirming the grant, and I will prove by some means that the grant was patented.
Mr. EARLE: Object to this testimony as irrelevant, incompetent and immaterial and not affecting in any way the issue now before the court.
By the COURT: Admitted subject to the objection.
Mr. REYNOLDS: The act of confirmation is vol. 12, Statutes at Large, section 3, page 71.

Recess taken until 2 o'clock.

2 o'clock case resumed.

Witness TIPTON continued.

By Mr. REYNOLDS:

99 Q. Examine the testimonio in the original grant. I will get you to state whether or not the signature of Fernando Chacon as it appears on that document is genuine.
A. Yes, sir; I believe it is.
Q. I will get you to examine that survey or plat (being official plat of the confirmed Cañon de San Diego grant).
A. That is the approved plat issued under the confirmation of the big grant.

Mr. EARLE: This testimony is absolutely irrelevant, and I object to it as not conclusive or having any bearing on any question involved.

By the COURT: Does the act of Congress show the grant of '98 includes all of the land in the grant of '88?

Mr. EARLE: The act of Congress shows that the big grant is confirmed.

Mr. REYNOLDS: As yet I don't know—that is, the record don't show, but as soon as possible we will have a copy of the patent here and offer it as an exhibit on behalf of the United States.

JESUS TRUJILLO, sworn, testified on behalf of the defendants, in Spanish, as follows:

Examination by Mr. RODEY.

Q. Tell your name.
A. Jesus Trujillo.
Q. How old are you?
A. Seventy-eight.
Q. Where do you reside?
A. At Cañon de San Diego.
Q. What county?
A. Bernalillo.
Q. How long have you lived there at the cañon?
A. During my lifetime.
Q. Do you know the Indian Pueblo of Jemez?
A. Yes.
100 Q. How far is this place—cañon—where you say you live, from that pueblo?
A. A league or a league and a half.
Q. In what direction is the cañon from the pueblo?
A. South.
Q. You mean the pueblo is south from the cañon?
A. Yes, sir.
Q. What are the names of the rivers at the cañon?
A. San Diego and Our Lady of Guadalupe.
Q. Do the rivers join there at the cañon?
A. Yes, sir.
Q. Do you know where the north line of the Indian pueblo lands are in that vicinity?
A. Yes, sir.
Q. How far is it from the cañon?
A. About four hundred yards only.
Q. Do you live in the same place there at the cañon that you have always lived at?
A. Yes, sir.
Q. Who owned it or lived there before you, if anybody?
A. Antonio Garcia de Noriega.
Q. How did you come into possession of the Antonio Garcia place?
A. I bought of Nerio Montoya.

Q. What relation was Nerio Montoya to Antonio Garcia de Noriega?

A. He was a grandson.

Mr. RODEY: We call attention of the court to the fact that this Noriega was one of the grantees.

Mr. EARLE: I object to the testimony as irrelevant and incompetent because it cannot and does not bear upon any issue involved in the case or before the court.

Mr. RODEY: This location proves this man lived a mile and a half outside of the little grant.

By the COURT: Admitted subject to the objection.

Q. Mr. Trujillo, when you were a boy did you hear the
101 question discussed with reference to any partition there near the cañon that had taken place years ago?

Mr. EARLE: I object to it as incompetent.

By the COURT: This is with reference to the proof of the fact; that is the objection. The other objection was as to the competency of the fact, which we did not pass on. It is proper, however, to show the fact by competent testimony. The objection overruled.

Q. How many varas of land do you now occupy that you say used to belong to Jose Garcia de Noriega?

A. They are nine hundred.

Q. Do you mean from north to south?

A. Yes, sir.

Q. Where is all this land?

A. At the edge of the Pueblo league.

Q. Is your whole nine hundred varas in one place, or more than one place?

A. They are together.

Q. Does it begin right at the boundary line of the Pueblo league?

A. Yes, sir; from the Pueblo boundary to the north.

Q. How far is it from our land to the junction of the rivers north?

A. They have found that there are twenty-one hundred varas from the Indians' league to the junction of the rivers.

Q. And you have nine hundred of the twenty-one hundred?

A. Yes, sir.

Q. Did any people occupy any land above the junction of the rivers when you were a boy?

A. I did not know it and I did not see them.

Q. When did you first see people occupying land north of the junction of the rivers?

A. When the land was partitioned, which was partitioned by Armenta, then at that time those twenty-one hundred varas were also partitioned.

102 Q. Do you mean at any other time?

A. The two cañons, sir, were partitioned between twenty-two men.

Q. The cañons, they begin right at the junction of the rivers?

A. Yes, sir.

Q. When did you first see any one living in those cañons?
A. As far back as the year '37, when I came to the age of reason I saw people living there.
Q. Do you know Jose Antonio Garcia de Noriega?
A. Yes, sir.
Q. Where did he live?
A. At the house where I live.
Q. Did you ever hear of his brother Francisco Noriega?
A. Yes, sir; I heard of him only; I did not know him.
Q. Did you know of any land in that vicinity said to have been allotted to him?
A. I did not know, sir; I did not know the ranches; the man was already dead.
Q. Do you know where the Jemez hot springs are?
A. Yes, sir.
Q. How far is that from the junction of the river?
A. Nine miles.
Q. When did you first know those springs?
A. When I was born, or when I got to the age of reason.
Q. When you were a little boy, as far back as you can recollect do you remember any one living up at those springs or anywhere near it?

Question withdrawn.

Q. State whether or not—who was the first person you knew to live at the hot springs?
A. A man called Lorenzo Gonzales.
Q. When was that?
A. In the year '37; the cañon was depopulated.
Q. What was the cause of this?
A. The war with the Indians.
103 Q. When did they go back there?
A. Year forty-three.
Q. Whereabouts in the cañones were they living in 1837?
A. There were already a few up near to his own ranches.
Q. Where were these ranches with reference to the town of Cañon?
A. They were in all the cañon, divided in portions of three hundred varas.
Q. How far from the town of Cañon did these allotments extend north; how far north from the junction of the rivers did these allotments of land extend?
A. The boundaries are mentioned as far as the Valle de Cueva and extends north so far as the water leap.
Q. When did you first hear of this little grant, if you ever heard of it?

Mr. EARLE: Objected to as immaterial.
By the COURT: Objection overruled.

A. In 1850. When the surveyor of the United States came here first we presented that grant to be approved.

Q. What grant do you mean?
A. Both of them were brought and delivered together, and told the surveyor a number of the allotments were all together under the decree of Armenta and that of Chacon.
Q. What was done?
A. They got a certificate of the second grant.
Q. Where did these papers of the first grant come from?
A. From the house of the late Nerio Montoya.
Q. Was that the first time you had seen them?
A. Yes, sir.
Q. You knew Jose Antonio Garcia de Noriega?
A. Yes, sir.
Q. Did you ever hear him say anything about the little grant?

Mr. EARLE: Objected to as hearsay.
Mr. RODEY: I will change the question.

104 Q. Before 1850, when you saw you first saw these papers, did you ever hear the Noriegas laying any claim under the little grant?
A. No, sir.
Q. What grant are you claiming your lands under at the present time?

Mr. EARLE: Objected to as immaterial and irrelevant.
By the COURT: Admitted subject to the objection.

A. From the second.
Q. What grant have you always claimed your lands under?

Mr. EARLE: Objected to as immaterial and irrelevant.
By the COURT: The understanding of the court is that this man's lands are located between the Indian Pueblo boundary and what is claimed to be the south boundary of this smaller grant and clearly outside of the claim made under the little grant. Therefore the objection will be sustained.

Q. Did you know Jose Francisco Archuleta in his lifetime?
A. I knew him all my life. He was also raised and born there.
Q. Where is he now?
A. He is in the graveyard.
Q. When did he die?
A. I do not know. It is about eight or nine years ago.
Q. Where did he live most of his life?
A. At Cañon de San Diego.
Q. What part of the cañon?
A. At the place called El Rillito.
Q. How far is that from the mouth of the cañon, where the rivers join?
A. It is about two thousand varas.
Q. Two thousand varas up or down the cañon?
A. Above the cañon.
Q. Where did he live after that?
A. At the springs.

Q. How far is that up the cañon from the junction?
A. Nine miles.

105 Mr. EARLE: Objected to as immaterial as to where Archuleta lived.

Examination by Mr. CHILDERS:

Q. Did you ever know Jose Francisco Archuleta?
A. Certainly; we were brought up together.
Q. How old was he when he died?
A. I think he was over eighty years old.
Q. Do you know where his lands were located with reference to the smaller grant?

Mr. EARLE: Objected to as immaterial.
By the COURT: Admitted subject to the objection.

A. At Rillito.
Q. How far was his lands that you speak of from the springs?
A. About eight miles; probably more.
Q. How far from the junction of the river?
A. I have said about two thousand varas.
Q. Was it north or south of the junction of the river?
A. North.
Q. In which cañon was it?
A. Cañon de San Diego.
Q. You speak of two cañons; what are the names of those two cañons?
A. There are two cañons—Cañon de San Diego and Cañon de Guadalupe.
Q. Is the Cañon de Guadalupe in the large or small grant?
A. It is in the small grant and it is in the large grant and the lands are adjoining.
Q. You speak of two cañons, San Diego and Guadalupe; are both of them in the small grant—the first grant?
A. They are in the second.
Q. Cañon de San Diego, is that in both of the grants?
A. Yes, sir.
Q. The Cañon de Guadalupe is in——
A. In the second grant.
106 Q. In the large grant?
A. Yes, sir.
Q. Do they come together?
A. Yes, sir.
Q. Where do they come together?
A. At the junction of the rivers?
Q. They branch off at the junction of the rivers?
A. The- branch off there to the north.
Q. One goes to the right and one to the left?
A. Yes, sir.
Q. In what direction, north or south?
A. Both to the north.

Q. Which one goes to the right?
A. That Cañon de Guadapule goes to the left and Cañon de San Diego to the right.
Q. You say lands were allot-ed in both cañons, as you understand?
A. Yes, sir.
Q. Francisco Garcia, you said, had lands there. In which cañon did he have lands in?
A. Before the partition was made?
Q. After the partition.
A. At that time Antonio Garcia de Noriega said he had lands in the Indians' league.

Mr. EARLE: Objected to as immaterial and hearsay.
Admitted subject to the objection.

Q. Where did you understand after the partition Antonio Garcia de Noriega said he had lands?

Mr. EARLE: Objected to as immaterial as to where he had lands.
By the COURT: Admitted subject to the objection.

A. I have said there at the league belonging to the Indians—from the Pueblo Indian league up north.
Q. Did you know Francisco Garcia de Noriega?
A. No, sir; that man was killed a long time before by the Apaches.
107 Q. You state that he had those lands there; you did not know him; how do you know those were his lands; who told you?

Mr. EARLE: Objected to as hearsay.
By the COURT: Admitted subject to the objection.

A. The people told me that; I did not know the man.

Mr. EARLE: Objected to as hearsay.

Q. How often did you hear that said; for how long a time; how often?

Mr. EARLE: Objected to as hearsay and incompetent.
By the COURT: Objection sustained.

Q. You say Jose Francisco Archuleta had lands up at the springs also?
A. Yes, sir; that was after the year '40.
Q. Were those lands at the springs inside or outside of the small grant?
A. The springs are not in the grant; they are above.
Q. Well, where were his lands with reference to the springs; his last tract; how far?

Mr. EARLE: Objected to as immaterial and irrelevant.
By the COURT: Admitted subject to the objection.

A. What lands?

Q. The tract of Archuleta near the springs that you say he went in possession of in '40?

A. There at the end of the meadows—springs: where the meadows are; at that place the people attempted to construct their houses.

Q. When did they attempt to construct their houses?

A. About the year '43; the people attempted to extend to the cañones.

Q. About the year '43; was that the time Archuleta went there?

A. No, sir; he lived there before; he lived there all his life.

Q. In the meadows?

A. At the center of the springs; at the edge of the meadows.

Q. Did he live there all his lifetime?

108 A. Part at the cañon.

Q. Part, you say?

A. Yes, sir.

Q. You said something awhile ago about the springs being abandoned; when were they abandoned on account of the Indians?

A. There were two uprisings; the first one I did not witness; the second one I did; at both times the cañon was abandoned.

Q. The last time, when was that?

A. In the year '37.

Q. When did you go back there to live?

A. I have said in the year '43.

Q. Where did they go when they went away?

A. They attempted to settle in the town at the place near Señora de la Canon de San Diego.

Q. Were they in the grant or without the grant?

A. They are in the grant.

Q. On the big grant or on the little grant?

A. It is in the larger.

Q. It is not on the small grant?

A. No, sir; it is not.

Q. Do you remember the condition—what was the condition during the civil war, when the Texans came up here?

Mr. EARLE: Objected to as immaterial.

By the COURT: Admitted subject to the objection.

A. When did those Texans come up here? Yes; I remember; I was already grown up, but I don't remember what year.

Q. Was it long before or after that when they came down there? What was the condition of this cañon?

A. All the people left their possessions.

Q. They were driven away, then?

A. Yes, sir.

Q. You mean the Cañon de San Diego?

A. Both of them.

109 Q. At the time Archuleta went there, in 1840 or '43, *and* you say, did he continue to live there or not?

A. Yes, sir; and he died there.

Q. Did you know the lands that Mr. Miller bought from Archuleta?
A. Yes, sir.
Q. Where is that situated?
A. At the place that is called Del Pueblo.
Q. How far is that from the springs?

Mr. EARLE: Objected to as immaterial and irrelevant.
By the COURT: Admitted subject to the objection.

A. About six hundred yards.
Q. Is it north or south of the springs?
A. To the north.

Cross-examination by Mr. EARLE:

Q. I understand you that the Cañon de Guadalupe is not on the little grant at all?
A. I do not know, as I do not know the small grant very well.
Q. Ask him if he didn't say a while ago, in answer to Mr. Childers, and before that to Mr. Rodey, that it was not on the small grant.
A. No; it is not on the small grant.
Q. You say that the people, after they were driven off by the Indians, settled on the Cañon de Guadalupe?
A. When it was partitioned to some of them by Chacon and Armenta.

Witness excused.

EMITERIO ARCHULETA, sworn, testified on behalf of the defendants, in Spanish, as follows:

Examination by Mr. RODEY:

Q. Where do you live?
A. At the hot springs.
Q. What county in this Territory.
A. Bernalillo.
110 Q. What was your father's name?
A. Jose Francisco Archuleta.
Q. Is your father alive or dead?
A. He is dead.
Q. When did he die?
—. About three years ago.
Q. Do you know what his father's name was, your grandfather?
A. Yes, sir.
Q. What was it?
A. Blas Archuleta.
Q. What was Blas Archuleta's wife's name, if you know?
A. Josefa Jaramillo.
Q. State whether or not she was any relation to Jose Jaramillo, one of the original grantees to the Cañon de San Diego grant—second grant.

A. She was his daughter.
Q. How old are you?
A. I am forty-six years.
Q. Where were you born?
A. At the Cañon de San Diego.
Q. What part of it with reference to the junction of the Jemez and Guadalupe cañons?
A. About a mile and a half from the junction to the north.
Q. In which cañon?
A. In the Cañon de San Diego.
Q. Did your father have any land there where you say you were born?
A. Yes, sir; on the land of the late Don Jose Maria Jaramillo, grandfather of my father.
Q. Who was this Don Jose Maria Jaramillo? What relation did he bear to the grant, if any?
A. He was one of the grantees of the grant.
Q. How many years were you on that same land?
A. About twenty-two or twenty-three.

111 Mr. EARLE: I wish to enter an objection to all this testimony as irrelevant and immaterial.

Q. You say that you were born on the land that used to belong to your great-grandfather, Jose Maria Jaramillo, who was one of the original grantees of the grant?

Mr. EARLE: Objected to as immaterial.
By the COURT: Admitted subject to the objection.

A. Yes, sir.
Q. And you say that was a mile and a half above the junction of the rivers?

Mr. EARLE: All of this is objected to.

A. Yes, sir.
Q. How much did your great-grandfather have there, if you know?
A. Three hundred varas.
Q. What did your father do with that land, if anything?
A. They are there.
Q. Still belong to his family?
A. Yes, sir.
Q. How many years did you live there before you left, from the time you were born?
A. I do not know exactly how long I lived there. We have spent all our time there—myself and my father—there at that place.
Q. Where have you lived the latter part of your lifetime?
A. Somewhat above the hot springs.
Q. When did you go up there to live?
A. In the year '65.

Q. Did your father go there at the same time?
A. Yes, sir.
Q. Any other people move *move* up there with you?
A. Yes, sir.
Q. How many people?
A. I do not remember very well. I think about four or five persons.

12 Q. When you were living down a mile above the junction of the rivers who, if anybody, wa*w* living at the springs?
A. Nobody.
Q. When did anybody first go to live there, to your best recollection?
A. My father.
Q. You and your father were the first *you* moved up there?
A. Yes, sir.
Q. Now, down at the place w-ere you were born, state, if you recollect, how many people owned land and lived there at the junction f the rivers since you were old enough to know any one.
A. I do not recollect; I was born and spent my youth there.
Q. Don't you remember the names of any of your neighbors or nybody living there except your father?
A. After having lived in that place which I have mentioned we rossed over the river and lived in the same direction.
Q. I ask you at the place which you were born, which was a mile nd a half above the junction of the rivers, in the San Diego cañon, hether or not any other people lived there at the same time.

Mr. EARLE: Objected to as leading.
By the COURT: Overruled.

A. In that cañon where we started ourselves to live there were a ood many persons there.
Q. How old were you then?
A. About twelve or fifteen years.
Q. Who lived up this Cañon de San Diego besides your father?
No reply.
Q. You say you were fifteen years old when you lived at the añon de San Diego—about twelve or fifteen. You remember things at happened before that, don't you?

Mr. EARLE: Objected to as leading.
Question withdrawn.

3 Q. You say it is the land your father had and which was allotted your great-grandfather, Jose Maria Jaramillo?
A. Yes, sir.
Q. Was there any other land belonging to anybody else allotted the same time?
A. I think so.
Q. Who?
A. I did not know anybody living there.
Q. Any one plant the lands between the lands of Jose Maria Jaramillo and the hot springs?

A. There was nobody living there.

Q. I mean the lands from Jaramillo's down to the south—to the junction of the rivers on the south—who had lands there?

A. A man—Pablo Gallegos. I do not know any one else.

Q. How much land did your father have *had* the springs at the time of his death?

Mr. EARLE: Objected to as immaterial and leading—that there is no evidence that he had any at the time of his death.

Question withdrawn.

Q. You said your father went to the springs. State whether or not he took up any land there.

Mr. EARLE: Objected to.

Question withdrawn.

Q. State what your father did when he went to live at the springs.

A. After he arrived at the place he made his residence there.

Q. What did he do, if anything, with reference to lands?

A. He plowed the land and worked upon it.

Q. What did he do with it, if anything, afterwards?

A. A part of the land still belongs to the family of my father and another part was conveyed by my father.

Mr. EARLE: I object to the answer as incompetent—as trying to show evidence of ownership and cultivation without any evidence of title.

By the COURT: Objection sustained.

114 Q. What was your mother's name?

A. Viviana Montoya.

Q. Can you tell the court how, if at all, she was connected with any of the original grantees of 1798?

Mr. EARLE: Objected to as irrelevant and as already been answered.

By the COURT: Overruled.

A. I know that there were some relatives of my mother who were grantees of this grant—the Montoyas.

Q. Can you tell what was your grandmother's name on your mother's side?

A. Marta, and that is the mother of my mother.

Q. What was her father's and mother's name?

A. I did not know them. I know the name of my grandmother's husband—Juan Antonio Montoya.

Q. What was his father's name?

A. I did not know him.

Cross-examination by Mr. EARLE:

Q. How old were you when you first remember anything?

A. I think about eight or ten years old.

Q. Where were you living then?

A. I should think with my father.
Q. Where did your father live?
A. He lived at that same place—at that same land that I have mentioned—at the Cañon de San Diego—when I was eight years old.

Q. Where are these three hundred varas that were allot-ed up at the Cañon de Guadalupe?

Mr. RODEY: I object to that sort of examination, as the witness did not say that.
By the COURT: Ask the witness if he said it.

(Mr. EARLE:)

Q. Didn't you say your father had some land allot-ed off to him in the Cañon de Guadalupe?
115 A. I have not said so.
Q. Did you say he and others lived there?
A. Yes, sir.
Q. What land did he live on then?
A. He had some strips of land in the Cañon of Our Lady of Guadalupe.
Q. Was that the land allotted to him, in the Cañon de Guadalupe?
A. No, sir.

Witness excused.

FRANCISCO PEREA, sworn, testified on behalf of the defendants as follows:

Examination by Mr. RODEY:

Q. How old are you?
A. Sixty or sixty-one.
Q. State where you were born.
A. I was born at Padillas, thirty miles below Albuquerque, on the west side of the river.
Q. State what your occupation is.
A. Farmer.
Q. What official position, if any, have you held in this Territory?
A. I have been a representative, senator, and a member of Congress, recorder county of Bernalillo, and have been lieutenant colonel in the army, and, yes, major general of militia.
Q. Where do you live?
A. I live at the hot springs.
Q. Do you know this land in question—this little grant of 1788?
A. Yes; I know it.
Q. Do you know where the town Cañon is?
A. Yes, sir.
Q. How long did you live at Padillas when you were there?
A. I was only born there.
Q. Where have you lived most of your lifetime?
A. In Bernalillo.

116 Q. How far is that from Jemez hot springs?
A. Forty miles.
Q. When did you first go to the hot springs?
A. The first time, in 1853.
Q. Tell the court who, if anybody, lived at or around the springs at that time.
A. There was not a living soul.
Q. Do you know the boundaries of this little grant?
A. I do.
Q. Was there at that time any person claiming to be living on it?
A. No, sir; there was not.
Q. Was there anybody living at this town of Cañon below?
A. Yes, sir.
Q. Where is it situated?
A. About a mile above the junction of the river and the Cañon de Guadalupe.
Q. Was there anybody living in the other, Cañon Jemez?
A. No, sir.
Q. Had you ever been up as far as the cañon previous to that time?
A. I think I had.
Q. When?
A. Cañon de San Diego previous to that time, no, sir; that was my first trip, in 1853.
Q. After that you have or have not gone through the cañon frequently?
A. Frequently, nearly every year.
Q. When did you learn of any person living there?
A. In 1864 and '65.
Q. Who was living there then?
A. There was a man by the name of Francisco Archuleta Sandoval. Jose Francisca Boros, a widow woman, lived a little above Domingo Salas.
117 Q. When did you first hear of this little grant?
A. In 1865.
Q. What was the occasion for your hearing of it?

Mr. EARLE: Objected to as immaterial and irrelevant.
By the COURT: Admitted subject to the objection.

A. I became interested in going to the hot springs of Jemez and knew the people and those who claimed to be owners of the grant.
Q. Of which grant?
A. The Cañon de San Diego, the large one; we only knew the one grant then, and in 1865 I got to searching up these records, when I heard of this little grant. I found that there was not such a little grant in existance. I looked everywhere, an- in the search I was assisted by agent for the United States at Fort ——, looking at the records, and Surveyor General Atkinson; Miller was clerk. They got us out every case.
Q. What caused you to take this course?

Mr. EARLE: Objected to as immaterial.

A. Because I was going to the hot springs of Jemez.

Q. Colonel, will you tell us, when you first heard of the hot springs of Jemez, what was the condition of the cañon with reference to evidences of occupation and cultivation?

A. The condition was wild. There were some ruins of houses, all old, some standing up and some with roofs on them. I know it was occupied, the property that I inherited from my mother.

Q. Give your linteage with reference to the grant, if you can.

A. My mother, Josefa Chaves, through inheritance from her father and mother, and they would give sheep out on shares, and when the sheep were given out they had to give security, in land, for their return; they lost the sheep and they got their land.

Mr. EARLE: I object to that as wholly immaterial and ask to have it stricken out.

By the COURT: Stricken out.

118 Mr. CHILDERS: We except.

Q. Where is this land that you live on?

A. I live at Jemez. I have two or three allotments two miles below the springs.

Q. How many pieces of land have you got there?

Mr. EARLE: Objected to as immaterial.

By the COURT: Admitted subject to the objection.

A. Two.

Q. Do you know who your people got that land from?

A. Yes, sir; a man named Aguilar and a man named Lopez, original grantees.

Q. In which grant?

A. In the big grant.

Q. And these pieces are located about two miles from the springs?

A. Near two miles; it may be two miles and a half.

Mr. EARLE: I move to strike out all that evidence of the witness in regard to the land which he now owns or claims to have purchased from somebody or other as incompetent and immaterial.

By the COURT: The objection will be sustained and that portion stricken out.

Mr. CHILDERS: We except.

Witness excused.

JUAN MARTIN, sworn, testified on behalf of the defendants, in Spanish, as follows:

Examination by Mr. RODEY & CHILDERS:

Q. Where do you live and what is your age?

A. Live at Cañon de San Diego, and *my* fifty-seven years old.

Q. How long have you been living there?

A. I live in the grant of the Cañon de San Diego.

Q. What was your father's name?
A. His name was Matias Martin.
Q. What was your grandfather's name on your father's si
119 A. Juan Domingo Martin.
Q. What land do you now live on?
A. I live on my own land; on the land which came to h through his father.
Q. You are living on the land which you were born on?
A. Yes, sir.
Q. And claim it by inheritance from your father?
A. Yes, sir.
Q. Did he inherit it from his father?
A. Yes, sir; from my grandfather.
Q. Did your grandfather live on this same piece of land?
A. Yes, sir.
Q. Which direction is this land from the junction of the Jem and Guadalupe rivers?
A. From the junction of the rivers, my land, it may be about t miles, more or less.
Q. Which way; up or down the river?
A. Up the river.
Q. In which cañon?
A. The cañon that we there sometimes call the Cañon of our La of Guadalupe, but it is the same Cañon de San Diego.
Q. When was the first time that you heard of the papers in t little grant?
A. About the year '61.
Q. Under what circumstances did you afterwards discover the

Mr. EARLE: Objected to as immaterial and irrelevant.
By the COURT: Objection overruled.

A. A brother of mine had those papers.
Q. Tell all about it.
A. In the year '61 this man that I saw was married to a sister mine, Nerio Montoya. Then he was going over his papers, and showed me this paper and said to me, "This paper had been giv to my grandparents," and then he said to me, "This paper is n worth anything to us, his heirs, because this paper w
120 first given to our grandparents and my uncle Jose Anton Garcia de Noriega and Francisco Garcia, and they havi *trans*pired, there came some grandchildren, Don Francisco Garcia Noriega, Agustin del Valle, and Agapito Garcia." When th came to the house of this Don Nerio Montoya they brought wi them Father Valencia, and then Nerio Montoya went and broug the papers and placed them on the table; while they were looki over the papers Father Valencia found this paper which Don Ne had said to me had belonged to our grandparents, and then Fath Valencia took this paper and then went outside, and as I was errand boy I went out in the yard also, and Father Valencia sa to Agustin del Valle, "Man, take this paper; it will be worth somethi to you some time." I don't know anything else about that matt

Q. Now, I will get you to state whether anybody had made any claim, to your knowledge or information, to that land under these papers prior to that time.

Mr. EARLE: Objected to.
By the COURT: Overruled.

A. No, sir.

Witness excused.

J. W. MILLER, sworn, testified on behalf of the defendant as follows:

Examination by Mr. CHILDERS:

Q. Where do you reside?
A. The Pueblo of Jemez.
Q. Are you acquainted with the Cañon de San Diego?
A. Yes, sir.
Q. Are you acquainted with this man who has just testified?
A. Yes, sir.
Q. Where does he live?
A. About a mile south of the Jemez hot springs. He
121 cultivates land about two miles south, but a mile south is where he lives.
Q. How far is it from the Pueblo of Jemez to the junction of the rivers?
A. Five miles.

Cross-examination by Mr. EARLE:

Q. Do you know how long since he lived at the Cañon de Guadalupe?
A. He has been living there the last nineteen years.
Q. Living where?
A. Where he is living now.
Q. Do you know whether he lived in the Cañon de Guadalupe?
A. I do not.

Re-examination by Mr. CHILDERS:

Q. You don't know whether he ever lived there?
A. No, sir.

Mr. EARLE: I wish to object to the testimony of Witness Juan Martin so far as it relates to conversations and transactions between Nerio Montoya because it is not shown that Montoya is dead.
By the COURT: Ruling on this objection will be reserved.

ANTONIO JOSE GARCIA, sworn, testified on behalf of the defendants, in Spanish, as follows:

Examination by —— ——:

Q. Where do you live?
A. Cañon de San Diego.

Q. How old are you?
A. I was born in the year '25.
Q. Are you a descendant of Francisco Garcia de Noriega or Antonio Garcia de Noriega?
A. Myself and my wife.
Q. In what part of the cañon do you live in?
122 A. I live near the hot springs.
Q. Where were you born?
A. At Albuquerque.
Q. When did you go to the Cañon de San Diego?
A. At the time when I went there, '63, until now.
Q. Who did you find at the springs when you went there in '63?
A. At the time I went there there was nobody there except for pasturage, Francisco Cordova.
Q. Do you own any other land in any other place in that cañon now?
A. Above the junction of the rivers.
Q. Above the junction of the rivers?
A. Where the hot springs are is where I live.
Q. Who did you get that land from?
A. I obtained it from various parties—several individuals; I obtained some from Solidad Chaves.

Mr. EARLE: Objected to as incompetent.
By the COURT: Admitted subject to the objection.

Q. Was that above or below the junction of the rivers?
A. At the junction itself—below.
Q. What paper is this?
A. Those are documents of mine.
Q. For what land?
A. I don't know which one is; I have various of them—one from Salvador Lopez, one from Trindidad Lopez.
Q. When did you first hear of the claim of the Noriega grant?

Mr. EARLE: Objected to as immaterial.
By the COURT: Objection overruled.

A. About that I have never heard anything said for thirty years; every one was recognizing the larger one.
Q. Did your title come from that one?

Mr. EARLE: Objected to as incompetent.
By the COURT: Objection sustained.

Q. Did you ever claim any land there from the Noriegas
123 under the little grant?

Mr. EARLE: Objected to as incompetent.
By the COURT: Overruled.

A. I claim everything by purchase.
Q. Did you ever claim as an heir of the Noriegas; have you ever asserted any claim against anybody as an heir of the Noriegas?
A. No, sir; I have not claimed as an heir.

Q. Who did you get this paper from?
A. I don't know it from any other.
Q. First deed that is signed by Santiago Montoya, what land is that for?

Mr. EARLE: Objected to as not the best evidence, the deed being the best evidence.
By the COURT: Objection sustained.
Witness excused.

J. M. MILLER, witness, recalled.

Examination by Mr. CHILDERS:

Q. Look at the paper shown you and state if you claim to own land inside of the grant and by what deeds of conveyance you claim it.
A. These deeds are four deeds—one I have from Archuleta, one from Juan Francisco Archuleta and wife, and two from Polito Mestas.
Q. Those are all?
A. Yes, sir.

Mr. CHILDERS: I offer these deeds in evidence; also deeds to his grantors.
Mr. EARLE: I object to them for the reason that they are immaterial and irrelevant; they have been made at a late date and can have no possible bearing in the way of proof.

Q. I will ask you to state from — your grantors claimed this land, if you know.

Mr. EARLE: I object to it as incompetent to prove title to property by parol.
124 By the COURT: Admitted subject to the objection.

A. The first two from Polito were deeded to him by Antonio Atencio.
Q. Those were the deeds that were turned over to them?
A. Yes, sir.
Q. Do you know under whom Atencio claimed title?
A. They were, I believe, heirs. I don't know.
Q. That's all you know about it?
A. Yes, sir.

Court here adjourned to Thursday morning.

THURSDAY MORNING, at 10 o'clock.

JESUS TRUJILLO, witness, recalled.

Examination by Mr. RODEY:

Q. I believe you stated yesterday you were born on this grant?
A. Yes, sir.
Q. How many people were living on this grant in the Cañon de

San Diego, north of the junction of the Jemez and Guadalupe rivers?

A. There were over seventy persons.

Q. Name some of them.

A. Antonio Garcia de Noriega, Juan Jose Gutierrez, Bartholomew Montoya, Juan de Aguilar, Joaquin Montoya. Those people lived from the junction of the rivers, below the junction.

Q. I asked who lived north of the river.

A. All those.

Q. Who then lived from the Indian pueblo to the forks of the river?

A. These five persons that I have mentioned.

Q. Who lived north of the forks of the river, above the forks, in the cañon?

A. Tomas Lopez, Jose Jaramillo, Juan Montoya, Loreto
125 Marquez, Chapita Ortega, Juan Salas, Bartolo Sanchez, Benito Lucero and a woman named Justa Jaramillo, and Betrola Jaramillo, and there was a ranch there belonging to Father Sanchez.

Q. When was this?

A. From the year twenty they were among the first. They belonged to the people who attempted to live in the grant.

Q. Were they cultivating the land?

A. Yes, sir.

Q. How long did they and those claiming under them continue to occupy and cultivate land after that time?

A. I do not know. All the time, however, when I was there.

Q. When did they leave there, if they did so?

A. In the year '37 I saw the people at Jemez.

Q. What were they doing?

A. They were living there; they had war in the cañon.

Q. Why did they leave the cañon?

A. On account of the war with the Navajos.

Q. When did they return?

A. In the year '43.

Q. What did they do when they went back?

A. They made the small towns in the Cañon de San Diego and Cañon de Guadalupe.

Q. What are those towns now called?

A. Cañon de San Diego and Cañon de Guadalupe.

Q. How many inhabitants do they contain?

A. None are there but a few of them; they are all dead.

Q. How many people live there now at the present day?

A. I do not remember. They do not exceed twenty or thirty.

Q. Families or people?

A. Families.

Q. How much was there twenty years ago?

A. They were small; they were not large.

Q. What were they when the Texans came in?

A. They were in the same condition as today.

26 Cross-examination by Mr. EARLE:

Q. When were you born?
A. In the year fifteen.

Mr. EARLE: I object to the testimony as being irrelevant, immarial, and incompetent.
By the COURT: Admitted subject to objection.

Witness excused.

B. S. RODEY, sworn, testified on behalf of defendants as follows:

Examination by Mr. REYNOLDS:

Q. Mr. Rodey, where do you live?
A. Albuquerque, N. M.
Q. What is your business?
A. Attorney-at-law.
Q. You are one of the defendants involved in this action?
A. Yes, sir.
Q. You filed an answer in the case?
A. Yes, sir.
Q. Go on and state how you are interested in this property.
A. I have interests covered by the big grant—the grant of 1798.
Q. In what way?
A. By purchase of an undivided one-third interest of Francisco rchuleta. I have also here some deeds for lands purchased—ips of land—near the springs. These three papers are from Juan rancisco Archuleta and wife, dated September, 1887. These are r lands near the springs. Another one is from the same parties—e same man, his wife having died—giving me an undivided one-ird interest in the large grant; also one Montoya, a deed from n for one-third interest in the grant. I wish to state that I purased these lands and received these deed, without any knowledge the small grant whatsoever.

27 Mr. REYNOLDS: Offer those deeds in evidence.

Cross-examination by Mr. EARLE:

Q. You did not give a great deal of money for these lands?

Mr. REYNOLDS: Object to the question as to the consideration.
By the COURT: Admitted subject to the objection.

A. I gave him altogether one hundred dollars in cash and twenty-e hundred dollars worth of services.
Q. You say this is under the larger grant?
A. Yes, sir.
Q. The larger grant is patented under the name, town of Cañon San Diego grant, is it not?
A. I don't know for sure, until I would see the patent. I have it the description.
Q. Then you purchased under the smaller grant, and not the ger one?

A. I am a purchaser under the larger one. I never heard of the existance of the little grant.

Q. I see these deeds state the Archuleta addition to the Jemez hot springs; they are inside of the little grant, are they not?

A. Yes, sir; as claimed.

Q. The other says, known as the "Cañon de San Diego grant," and yet you never heard of the smaller grant?

A. Never heard of it until three months ago.

Q. Let me call your attention to the language: The following-described tract of land or real estate, situated, lying, and being in the county of Bernalillo, Territory of New Mexico, undivided one-third, all the right, title, interest, claim, or demand that I have or may be entitled to in law or equity in and to the grant known as the Canon de San Diego grant, as same was made in 1788. If you had never heard of this little grant, how come you to put it "1788"?

A. I had never heard of this little grant; it must be 1798.

128 Q. So it is. You say you had never heard of this small grant, then you don't claim any interest in the small grant?

A. No, sir.

Q. You claim entirely under the large grant?

A. Yes, sir.

Witness excused.

JESUS TRUJILLO, witness, recalled.

Examination by Mr. REYNOLDS:

Q. Did you ever know Juan Atencio?

A. He was my brother-in-law.

Q. Who was his father?

A. Jose Atencio.

Q. Is Mr. Miller living on the land that he occupied?

A. Tomas Atencio is the land at the place where Mr. Miller lives. He is a brother of Jose Atencio.

Q. Do you know whether Mr. Miller is occupying and cultivating the land that Jose Atencio used to own?

Mr. EARLE: Objected to as a leading question.

A. Yes, sir.

Mr. EARLE: Object to the testimony as being irrelevant.

By the COURT: Admitted subject to the objection.

Q. Do you know Nerio Montoya?

A. Yes; — course.

Q. Do you know who was his father?

A. Yes, sir; an old man—Tomas Montoya.

Witness excused.

Mr. CHILDERS: I offer in evidence deeds of this man Haberland, claiming under Nerio Montoya, son of one of original grantees.

Mr. EARLE: I object to them as incumbering the record with testimony that is incompetent and immaterial to the issue.

By the COURT: Admitted subject to objection.

This was all the testimony.

29 *Certificate.*

I hereby certify that the above and foregoing forty-three (43) pages contain a full, true, and complete record of all the proceedings had in open court in this cause, the same being case No. one hundred (100), Amado Chaves *et al. vs.* The United States *et al.*

That the testimony of the witnesses recorded as speaking in the Spanish language is true and correct as given by the official interpreter of this court.

L. F. PARKER, JR.,
Official Stenographer, Court of Private Land Claims.

Santa Fé, New Mexico, September 29th, 1893.

30 UNITED STATES OF AMERICA, }
Territory of New Mexico, } ss:

I, James H. Reeder, clerk of the court of private land claims, do hereby certify that the foregoing pages contain a full, true, and complete transcript of the records and files in my office in the case filed therein in which Amado Chaves *et al.* are plaintiffs and the United States *et al.* are defendants, for the confirmation of a certain claim commonly known as the "Canon de San Diego grant," No. 100.

Witness my hand and the seal of this honorable court this 30th day of September, A. D. 1893.

[Seal Court of Private Land Claims, Santa Fé, New Mexico.]

JAMES H. REEDER, *Clerk,*
By IRENEO L. CHAVES, *Deputy.*

Endorsed on cover: Case No. 15,413. Court of private land claims. Term No., 40. Amado Chaves *et al.*, appellants, *vs.* The United States *et al.* Filed October 7th, 1893.

No. 4.

Stipulation for Addn. to Record.

Filed Oct. 12, 1897.

OCT 12 1897
JAMES H. McKENNEY,
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

AMADO CHAVES *et al*, *Appellants*,
vs.
THE UNITED STATES *et al*. } No. 4.

STIPULATION.

It is hereby stipulated and agreed by and between the parties hereto, through their respective attorneys, that the printed text of the following named documents (to be found as hereinafter mentioned), offered in evidence by the United States on the trial of said cause in the Court of Private Land Claims, and copies of which were omitted from the transcript of the record on file in the office of the Clerk of this Court, may be taken and considered as part of the record in the above entitled cause the same as if said evidence had been properly incorporated into the original record, certified copies of all of which documents are now on file in the office of said Clerk :

The title papers, and translation thereof, of the Canon de San Diego grant, offered in evidence by the United States (R. 54–55), and now to be found on pages 8, 9, 10, 11 and 12 of the brief of counsel for the government.

HENRY M. EARLE,
For Appellants.

MATT. G. REYNOLDS,
Special Assistant to the Attorney General, for the United States.

Nos. 1029 and 1030.

Motion & Papers for

Filed Mar. 5, 1894.

Office Supreme Court U.S.
FILED.
MAR 5 1894
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1894.

AMADO CHAVES *et al.*
vs.
THE UNITED STATES *et al.* } No. 1029.

Grant of the Canon de San Diego.

PUEBLOS OF ZIA, SANTA ANA, AND JEMEZ
vs.
THE UNITED STATES *et al.* } No. 1030.

Ojo del Espiritu Santo Valley Grant.

Appeal from the United States Court of Private Land Claims.

In asking leave of the court to renew the motions to advance these two cases, which were overruled at the beginning of the present term, it may be somewhat of an apology for our doing so to state that if they are to stand until reached in their regular order on the calendar

of this court it will be too late for the subsequent proceedings in the court below, which are required by the statute, since the life of that court is limited to one year from December 31 next.

The material question involved in these cases is whether the grant was what is known in the Spanish law as a "perfect" grant. This question is involved of necessity in many other cases, and it is manifestly of great consequence that the court below, which is a special tribunal of limited jurisdiction and limited life, shall have the benefit of the judgment of the appellate court upon this question, which is the fundamental one in so many other cases now pending before it, before trying them.

These grants upon one line are divisible into perfect grants, which constitute a complete legal title, and inchoate grants, which are equitable titles entitled to confirmation, but subject to equitable conditions. The shadows run between this classification, and require judicial construction. Without an authoritative ruling from the appellate court it must be apparent that a great many cases must be brought up by appeal in order to save questions, which, if decided here now, would be adopted as a rule of construction in other cases, and lead to their full adjudication without appeal.

Case No. 1029 was decided adversely to the appellants, who were the petitioners below, by three members of the court, the other two filing elaborate dissenting opinions.

The fundamental question involved in the appeal is whether this particular grant is a "perfect" one, and this question depends upon whether or not it is affected by an alleged condition subsequent. The decision of this question involves several important legal propositions, which must be more or less material in a large number of cases and fundamental in a great many now before the court

below, and it would seem to be a matter of general interest that said court should have the benefit of the decision of this court on this question at as early a day as practicable.

In case No. 1030 the question upon which the decision was rested is solely one of law, to wit, the construction of the grant, whether it is in its nature an absolute grant or a mere license to pasture, the court below having decreed that the petition be dismissed, "the grant not being in fee, but a license to pasture."

The decision of the main question in this case is believed to involve a number of legal questions of interest in many cases, and it would seem to be of general importance that these questions should be considered by this court as early as practicable in order that the court below may have the advantage of said decision in the consideration of other cases, both to facilitate the administration of justice and to avoid the necessity of multiplying appeals.

JEFFRIES & EARLE,
Attorney for Actors.

1417 G St. N. W., March 1, 1894.

Office Supreme Court U. S.
FILED.
MAY 5 1894
JAMES H. MCKENNEY,
CLERK.

Nos. 1029 and 1030.

Brief of Carlo. Jeffries & Woodward for Appts. Cross.

Filed May 5, 1894.

Supreme Court of the United States.

OCTOBER TERM, 18.3.

AMADO CHAVES *et al.*
vs.
THE UNITED STATES *et al.*
No. 1029.

Grant of the Canon de San Diego.

PUEBLOS OF ZIA, SANTA ANA, AND JEMEZ,
vs.
THE UNITED STATES *et al.*
No. 1030.

Ojo del Espiritu Santo Valley Grant.

BRIEF IN OPPOSITION TO MOTION OF THE SOLICITOR GENERAL TO DISMISS THE APPEALS.

On February 2, 1848, the United States and Mexico made a treaty of peace, friendship, limits, and settlement, in which a large area of Mexican territory was ceded to the United States.

Article 8 of that treaty provides that Mexicans estab-

lished in the ceded territory should be free to continue where they now reside or to remove to Mexico, "retaining the property which they possess in said territories or disposing thereof and removing the proceeds where they please;" and this without contribution, tax, or charge whatever.

By article 9 the United States expressly stipulated that such Mexican residents "shall be maintained and protected in the free enjoyment of their liberty and property, and secure in the free exercise of their religion without restriction."

Article 9 of the treaty of Guadalupe Hidalgo, as originally proposed, was suppressed by the United States and article 3 of the treaty of Louisiana substituted. But by a protocol made on May 24, 1848, before the exchange of ratifications, and without which protocol it is manifest that the Mexican Government would not have ratified the treaty, the American Commissioners declare that—

"Its understanding is that all of that agreement is contained in the third article of the treaty of Louisiana. In consequence all the privileges and guarantees, civil, political, and religious, which would have been possessed by the inhabitants of the ceded Territories if the ninth article of the treaty had been retained, will be enjoyed by them without any difference under the article which has been substituted."

The Commissioners further explain that the suppression of article 10 was not intended to annul grants of land in the ceded Territories, and added that "these grants, notwithstanding the suppression of the article of the treaty, preserve the legal value which they may possess, and the grantees may cause their legitimate titles to be acknowledged before the American tribunals."

On December 30, 1853, another treaty was made between the United States and Mexico, whereby, in consideration of $10,000,000, the Government of Mexico released

to the United States a large additional area of territory. By article 5 of that treaty the provisions of articles 8 and 9 of the treaty of Guadalupe Hidalgo are made applicable to the territory ceded by the Mexican republic.

In consequence of this cession of territory and of these treaties a solemn duty and obligation was assumed by the United States to protect these people in their property, and the Supreme Court has expressly decided that these grants, which are perfect, and inchoate grants also, and mere equities to titles, constitute property. (Henshaw *v.* Bissell, 18 Wall., 264.)

It is the law of the United States as settled by the Supreme Court, that until the political branch of the Government provided for the confirmation of these foreign titles in acquired territory they could not be enforced in court—actions could not be maintained upon them. (Henshaw *v.* Bissell, *supra*; Astiazaran *v.* U. S., 148 U. S.)

In pursuance of this legal status in a portion of this ceded territory, to wit, that formed into the State of California, Congress, in 1851, in the discharge of its manifest duty, provided for the investigation of all the grants therein, perfect as well as imperfect, and in consequence, the titles in that State being settled and investors feeling safe in them, a career of unparalleled prosperity quickly set in. How different the situation wrought in New Mexico by the opposite policy!

In 1854, instead of referring the titles to a competent tribunal vested with authority to decide and determine upon their validity, Congress provided for an examination by the Surveyor-General, authorizing a report to itself. Under this provision much outrage has been done to law and justice by Congress, ignorant of the status of senior perfect grants, confirming many junior and imperfect ones, and thus, instead of relieving the titles from cloud, piling up litigation upon them; all of which made really a premium on lobbying, false representation, and

fraud. These confirmations, however, have not settled anything as to the titles, and have only multiplied and massed up litigation.

Frisby *v.* Whitney, 9 Wall., 187.

After the act of 1854 all of these titles were held *sub judice*, and suits could not be maintained on them or adverse rights acquired. (Newhall *v.* Sanger, 92 U. S., 761; Doolan *v.* Carr, 125 U. S., 618; U. S. *v.* McLaughlin, 127 U. S., 428; Cameron *v.* U. S., 148 U. S., 310.)

The situation was simply one of unrest and confusion; nothing could be adjudicated and nothing could be settled, and the status so remained until the passage of the act of March 3, 1891, to establish the Court of Private Land Claims. Under it quite a number of cases—about 50 out of 270 filed—have been tried. In several the claimants have appealed, and the Government manifests a general disposition of doing so. Among the former is the case of Amado Chaves *et al. v.* United States *et al.* (No. 1029). This grant was made by the Spanish governor, Concha, January 27, 1788, to the two Garcia brothers. It is absolute and unconditional in terms. On February 6 of the same year juridical possession was given.

The court (two members dissenting) refused confirmation on the ground that the grant was not perfect, in that there was no proof of the four years' occupation required by the Spanish law, during which it was liable to denouncement. In opposition to this view it had been contended that this requirement was a condition subsequent, and, as there had been no evidence of denouncement, proof of performance of a condition subsequent was not necessary. But besides this, that a grant of the exterior tract was made ten years thereafter, and on the giving of juridical possession thereunder the Garcia brothers called attention to their grant, and it was dis-

tinctly agreed that it had precedence, as is shown by the record made by the chief alcalde who gave juridical possession in both cases; also by the further fact that twenty years later there was a contestation between the Garcias and the last settlers, which was referred by the alcalde to the governor, he being the chief judicial as well as executive officer of the province, and on December 13, 1808, the governor wrote the alcalde: "The last settlers can not deny to the Garcias the better title."

This case has been appealed to this court, and, on a second application to the court, it has been advanced, and is set for argument early next term.

The other case appealed by the claimants and advanced for early hearing is that of the pueblos of Zia, Santa Ana, and Jemez. This was an additional grant made to these three contiguous pueblos by the Spanish governor of the province (Cachupin) on June 16, 1766. The alcalde having reported, the governor decreed as follows:

"And the afore-mentioned boundaries being for the future considered those of the afore-mentioned three pueblos, they will hold the same with legitimate title under this royal grant, so that they be not molested by any Spanish citizen or citizens taking their stock thereon, deeming the pasturage to be common."

And he ordered the alcalde to give the pueblos "royal possession of this grant and the boundaries therein set forth, * * * placing his proceedings on record following this my granting decree, which he will return to me, in order to furnish to each pueblo the proper testimonio of the whole, and deposit the original in the archives of this Government, where it shall remain."

In pursuance of this decree, on September 28, 1766, the alcalde gave the governors and rulers of the pueblos juridical possession, and they have been in possession ever since. The second original or testimonio was produced on the trial by the governor of Zia.

The court held this to be a mere license to pasture; but, if in the beginning it had been, still by a decree of the Spanish Cortes of January 18, 1818, it was decreed that:

"*All pastures*, inheritances and other lands of whatever class they may be, and whether free or entailed, are declared from this time henceforth forever closed and confirmed perpetually to the owners or possessors thereof."

Leyes Vigentes, 1, p. 59;
Escriche, 1236, 1260.

Under Spanish law, too, a mere license to pasture after four years of occupation became an absolute title.

In both cases the descendents and representatives of the original grantees have had continuous possession of the land granted by virtue of the decree of juridical possession.

Under Spanish law, without a grant, the claimants in both cases have an absolute title by prescription.

Both are perfect grants, and it is most improbable that either of them would have been presented to the Court of Private Land Claims had not the statute provided for an appeal to the Supreme Court.

The treaty-making power under the Constitution having made these treaties, as already stated, "the duty of providing the mode of securing these rights, and of fulfilling the obligations imposed upon the United States by the treaties, belonged to the political department of the Government, and Congress might either itself discharge that duty or delegate it to the judicial department."

Astiazaran *v.* Mining Co., 148 U. S., 81.

This is not unusual. In the matter of the French spoliation claims the legislative elected to delegate to the judiciary certain demands against the United States;

but, instead of allowing an appeal in the regular line and in an orderly mode of judicial procedure, required a report back to itself, and then, being judicially advised of the obligation to pay, has repudiated it.

Gray's case, 21 Ct. Cls., 344.

In delegating its obligation to the judiciary the legislative branch created what it named "the United States Court of Private Land Claims," and clearly intended to constitute a court of the United States under the Constitution. It was invested by the act of Congress with all the power and paraphernalia of a court, as we shall presently see.

Whilst this power and duty of the political branch could be delegated to the judiciary, as we have seen upon authority, yet it is not disputed that it must be done in pursuance of the provisions and requirements of the Constitution, and that is the question here raised.

There is no doubt that this court is a Federal court and exercising exclusively Federal jurisdiction, for that which it exercises is power vested in the political branch of the Federal Government in carrying into proper legal effect the obligations assumed by the treaty-making power, which power is by the Constitution specially vested in the President and Senate of the United States.

It was a standing reproach to the United States that it had so long delayed to carry out the obligations it had so cheerfully assumed in connection with the territory acquired to the unfortunate people who by the cession had become American citizens. The enactment of this law was an attempt to do long-delayed justice and as reparation for a continuing wrong.

Under the provision "to make all needful rules and regulations respecting the territory or other property belonging to the United States" it is held that Congress may constitutionally legislate for the appointment of

judges in the Territories who do not so exercise the judicial power of the United States as that their appointments are "during good behavior," and, not being so, they are removable at the will of the President. Whatever may be the reader's opinion as to the soundness of these decisions, it is sufficient for the purpose of this argument that, as they rest upon the ground that such territorial judges do not exercise "the judicial power of the United States," they do not affect the case in hand, since the United States Court of Private Land Claims clearly does exercise the judicial power of the United States by direct authority of Congress in the exercise of its power to "from time to time ordain and establish" inferior courts.

The whole of this act is an example of badly-prepared and ill-considered legislation, and it needs the early consideration and construction of this court.

If the proceedings in this court provided for by the act are original in their nature, then they are without warrant in the Constitution, for the original jurisdiction of the Supreme Court is limited by the specific grants under the Constitution, and those in this act can not be brought within any of those expressly given in the Constitution, and the rule *inclusio unius est exclusio alterius* must apply.

But they are not original. An examination of the powers given in the act will demonstrate that they are such powers only as Congress might properly bestow under the provision that "the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as Congress shall make." The constitutional appellate jurisdiction may be invoked by writ of error as well as appeal, and Congress may regulate the cases wherein each shall be exercised; also limit cases in which either shall apply, *e. g.*, to cases involving $5,000. So that, under its constitutional power to regulate the appellate jurisdiction as to facts,

Congress may provide the mode whereby the facts may go before the Supreme Court. The act before us does no more than this.

Under our Constitution private property can not be taken for public use without just compensation; much less can one citizen's property be taken from him and bestowed on another. If any lands were legally granted by the Spanish or Mexican authorities, it is manifest that they could not be ceded to the United States, for the title was not in the Government of Mexico to cede; and the United States acquiring no possible title thereto, and being pledged to protect the titles of the Spanish or Mexican grantees, it would simply be robbery legalized by the robber for the United States to withhold confirmation of grants because, forsooth, under its laws squatters were holding lands which were embraced within valid legal grants which had divested the titles of the former government before the cession. Yet that is just what section 14 of this act expressly does. This unconstitutional provision is so grafted upon the jurisdiction of the court that a court of limited jurisdiction, powers, and life must have regard for and enforce it, which illustrates not only the necessity of an appeal but of an early hearing thereon.

It is true that this section (14) provides that a judgment may be given against the United States for $1.25 per acre of such land, which judgment shall be a charge on the Treasury; but if the $1.25 per acre were just compensation for land worth $20 to $100 per acre, condemned under the right of eminent domain for public use, that would not sanction the seizing at any price of one man's property to give it to another. Then, too, such a judgment may "be a charge on the Treasury of the United States;" but payment can not be had without an appropriation, and when Congress fails to appropriate for "valid obligations" found by the Court of Claims under

reference of special acts of Congress, and for judgments rendered under its organic act and affirmed by this Supreme Court, then such a "charge on the Treasury" can have no intrinsic, much less commercial, value, and the proffer of one is but that of the Dead Sea fruit.

Bad as this bungling, cumbersome legislation is, it promises better things than the condition which preceded it, and delay in the settlement of these titles is the refinement of cruel injustice; but this act stripped of the right of appeal would manifestly be a monstrous iniquity.

For a full half century these titles had remained undetermined. The settler had no means of ascertaining whether his occupancy was a lawful possession or a trespass. The Government was not informed whether the land was public domain or public property. Improvements by the settler were retarded and the sale of the public lands restricted.

Valid grants are protected by law and treaty; but their validity was a question for judicial determination, and there was no court to adjudicate it. To provide a remedy Congress passed the act of March 3, 1891, to establish a "court of private land claims."

By article 3 of the Constitution Congress has power to ordain and establish courts inferior to the Supreme Court. The judges of such inferior courts are to hold their offices during good behavior, and their compensation can not be diminished during their continuance in office.

The question now presented is whether or not Congress transcended its constitutional powers in establishing and ordaining an inferior court which was to exist for a specified period, and whose judges were to be appointed by the President with a tenure of office coextensive with the life of the court.

If the questions involved in the adjudication of these titles and the determination of their validity under the laws of the United States, the law of nations, and the

treaty stipulations, demanded the scrutiny of a court of the United States, it was clearly within the power of Congress to establish such inferior court under the authority conferred by article 3 of the Constitution, and provide that the judges should hold their offices during good behavior. But suppose Congress, in establishing this court, knew from the very nature of things and the purpose for which it was established that its functions would necessarily be discontinued at a fixed period of time, because at the expiration of that period the occasion and object of its creation would no longer exist, would such limitation of its life tenure affect its character as a court of the United States? In other words, is the existence of United States courts authorized by article 3 of the Constitution required by that instrument to be perpetual? On the other hand, if Congress may under said article establish and ordain an inferior court whose life tenure shall be determined by its creator, then it would be repugnant and inconsistent to provide for the appointment of its judges for life when the existence of the court is limited to a period less than a lifetime. Rationally, the tenure of office of the judges would be coexistent with the life of the court, or for good behavior during said period.

We submit, therefore, as the object to be accomplished by the establishment of such inferior court does not require that its existence should be perpetual, it is during its existence a court of the United States, invested with judicial power under the Constitution, and that the judges' tenure of office is during good behavior within the period for which the court was established.

The cases discussed by the Supreme Court, where the judges were created by authority of the territorial legislatures and those appointed for a term of years where the court was permanent, were not authorized by Congress under the Constitution, and have no application here.

All the text-writers, and, so far as we have examined, all the decisions, vindicate the wisdom of the framers of the Constitution in requiring that the judges should hold their offices during good behavior, on the ground that such tenure would secure the independence of the judiciary by placing the judges beyond the interference or control of the other departments of the Government. The same principle applies to courts created by Congress whose existence is limited to a specified period, provided the tenure of the judges is coextensive with the life of the court. If the court is established for a term of five years, and the judges are appointed for a like period, their independence of the other branches of the Government is as well secured as that of judges appointed for life or during good behavior to courts that have perpetual existence.

The Court of Private Land Claims was created and designated a "court." Its chief justice and four associate justices were appointed by the President as judges of said court. The United States marshals are its ministerial officers. It appoints its clerk, who issues its writs and enters its proceedings upon its journals; subpœnas witnesses, administers oaths, makes rules for its government, is provided with a seal, requires pleadings as other United States courts, examines witnesses, makes orders, hears and decides causes, and renders judgments and decrees, from which appeals direct to the Supreme Court are authorized. In brief, it is clothed with all the attributes of a court of "inferior jurisdiction," and is in no wise, so far as this question is concerned, similar to the cases of territorial courts.

The United States having, through the exercise of the authority vested in the treaty-making power, become solemnly bound to defend these titles, the duty became devolved upon the political branch of the Government to provide the machinery to do so, and after a long delay

it did provide a court. A permanent court was not needed for the purpose, but one for a few years only. Then, in order to exercise the judicial power of the United States, was it necessary that judges for a lifetime of good behavior should be appointed for a temporary court in order that they might exercise the judicial power of the United States? We think not. The court is to last until January 1, 1896,—shall the judges be appointed for life unless in the meantime guilty of misbehavior? Is it not sufficient that they "shall hold their offices during good behavior" and so long as the offices last?—that they are not subject to removal during the lifetime of the court?

It is supposed that the case of United States *v.* Ritchie (17 How., 533) gives a negative answer to these inquiries, but an examination of that case will show that Judge Nelson (as was not unusual) does not decide the point, but goes around it. He says it has been argued that the California Commission, under the act of 1851, is not a court under the Constitution, and cannot be invested with any of the judicial powers conferred on the general government, so he treats the appeal as one from the district court exercising original jurisdiction.

He cites the case of American Insurance Co. *v.* Canter (1 Pet., 511), and it is true that in the opinion in that case it is said:

> "The judges of the supreme court of Florida hold their offices for four years. These courts, then, are not constitutional courts in which the judicial power conferred by the Constitution on the general government can be deposited. They are incapable of receiving it."

That is true. But it is not because they "hold their offices for four years," nor yet because they were not appointed for life or during good behavior. It is because "they are legislative (territorial) courts, created in virtue

of the general right of sovereignty which exists in the Government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States." The reasoning applicable to the territorial courts appointed by the President under an act of Congress is peculiarly applicable to these courts created by a territorial act. They are not "courts of the United States" under Art. III of the Constitution.

It will not be questioned that besides the power vested in Congress by article 3 to ordain and establish such inferior courts, it may also, under section 3, of article 4, by virtue of the "power to dispose of and make all needful rules and regulations respecting the Territory," etc., establish courts with jurisdiction in the Territories which do not exercise judicial power of the United States and are not "courts of the United States." (McAlister *v.* United States, 141 U. S., 174.)

Mr. Justice Nelson, who delivered the opinion in the case of United States *v.* Ritchie, delivered that also in the case of Benner *v.* Porter (9 How., 235), which he cites as authority on this particular point in the Ritchie case. If we turn to the decision in Benner *v.* Porter on this point, at page 244 we shall find the original argument very meager. Mr. Justice Nelson says:

> "The territorial courts therefore were not courts in which the judicial power conferred by the Constitution on the Federal Government could be deposited. They were incapable of receiving it, *as the tenure of the incumbents was but for four years.*"

Now, this is almost a quotation of what Chief-Justice Marshall says in the case of American Ins. Co. *v.* Canter, 1 Peters, at page 546, except that he does not assign as a reason why the territorial courts were incapable of receiving the judicial power conferred by the Constitution

that "the tenure of the incumbents was but for four years." What he does say is:

"They are legislative courts, created in virtue of the general right of sovereignty which exists in the Government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States."

To exactly appreciate the force of this important decision by Chief-Justice Marshall, on which the errors of the two subsequent decisions are based, we must look at the facts of the Canter case.

A territorial court, created under an act of the territorial legislature by authority of an act of Congress, had sold a lot of cotton which had been saved from a wreck, for the purpose of compensating the salvors. A libel was filed in the district court of South Carolina to obtain restitution of a portion of this cotton so sold, and the precise question at issue was whether the sale made under the decree of the territorial court of Florida had changed the title—that is, whether the territorial court under whose order the sale had been made was a court competent to make a sale which would change the right of property. The district court held the decree of the territorial court a nullity, and this judgment was reversed by the Supreme Court.

In the discussion of the interesting questions involved in this case Chief-Justice Marshall of course omitted none, and left nothing wanting to be said in regard to any of them. He explains that section 2 of article 3 extends the judicial power to three distinct classes of cases which the Constitution contemplates as such, and that jurisdiction over one of them does not confer jurisdiction over either of the other two, and that a case in admiralty is not a case which arises under the Constitution and laws of the United States, and consequently that jurisdiction

of an admiralty case could be vested in a territorial court created by the territorial legislature and be exercised by it without infringement of the Constitution; and he says:

"The jurisdiction with which they are invested is not a part of that judicial power which is defined in the third article of the Constitution, but is conferred by Congress in the execution of those general powers which that body possesses over the territory of the United States."

We submit with very great deference that the conclusion which seems to be so readily reached by Justice Nelson in the case of Benner *v.* Porter and United States *v.* Ritchie is not sustained by the reasoning of Chief-Justice Marshall in the case of American Insurance Co. *v.* Canter.

Now, the applicability of the decision of Chief-Justice Marshall to the case at bar must depend upon whether the power of Congress to establish a United States court of private land claims rests upon the authority indicated by the three distinct classes of cases to which the judicial power is extended under the first paragraph of section 2 of article 3, or whether the authority to establish said court is to be found in the "general right of sovereignty which exists in the Government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States."

This proposition brings us back to the point of considering the nature of the jurisdiction vested in this court. And what is it? Why, as already seen, a duty was devolved by the treaties with Mexico on the United States to protect the rights of property in these Spanish and Mexican grants within the ceded territory, and to require the courts of the United States to respect these "legitimate titles." This duty, in the distribution of the powers of government, was devolved on the political

branch. The whole argument which I desire here to use is embodied in a few words in the Astiazaran case (148 U. S., 81), as follows:

"But the duty of providing the mode of securing these rights and fulfilling the obligations imposed upon the United States by the treaties belonged to the political department of the Government, and Congress might either itself discharge that duty or delegate it to the judicial department."

By the act of March 3, 1891, Congress delegated it to the judicial department, and the question before the court and the whole issue here involved is soluble by the answer to the single proposition, namely, did Congress "delegate this duty to the judicial department?"

The duty devolved upon the court is to investigate these titles under these grants, and if regular and legally valid their decree carries a quit-claim so far as any interest of the United States goes. By this judgment the grants are given a status in court as evidence of title, and it is thus that "the grantees may cause their legitimate title to be acknowledged before the American tribunals." This is surely Federal as against the territorial jurisdiction considered in American Insurance Company *v.* Canter and Benner *v.* Porter, and these would seem to be cases in law arising under treaties made under the authority of the United States. Then this land court, in the exercise of its jurisdiction, must exercise "the judicial power conferred by the Constitution on the General Government;" and the question recurs, does the constitutional provision that the judges "shall hold their offices during good behavior" necessitate their appointment for life, notwithstanding the fact that the work of the court can be effected in a few years, and the judges are appointed, confirmed, and commissioned for the life of the court, and shall hold their offices during good behavior for the period of the existence of the court?

Is there such an infirmity in the Constitution as that, when in the administration of our governmental affairs a special court becomes requisite for some judicial work, wherein it exercises the judicial power conferred on the General Government, the judges must be appointed for life, and after they have completed the work for which their court was organized, and are *functus officio*, they must walk around with nothing to do, and yet be obliged to draw a salary?

That is not American.

N. L. JEFFRIES,
WM. E. EARLE,
GEO. HILL HOWARD,
Attorneys for Appellant.

1417 G STREET, N. W.,
May 4, 1894.

No. 4.

Brief of Earle for Appts.

Filed Oct. 12, 1897.

FILED.
OCT 12 1897
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States

OCTOBER TERM, 1896.

No. ~~40~~ 4.

AMADO CHAVES ET AL., *Appellants,*

vs.

THE UNITED STATES ET AL.

Argument for Appellants.

HENRY M. EARLE,
Attorney for Appellants.

PRESS OF W. F. ROBERTS, WASHINGTON, D. C.

Supreme Court of the United States

OCTOBER TERM, 1896

No. 40

AMADO CHAVES ET AL., *Appellants*,

vs.

THE UNITED STATES ET AL.

The facts in this case are as follows:

During the early part of the year 1788, Francisco Garcia de Noriega and his brother, Antonio Garcia de Noriega, petitioned the Governor of New Mexico for a grant of land in the Canon de San Diego, the same being unoccupied and vacant.

On January 27, 1788, the Governor, Fernando de la Concha, granted the petition of said Noriegas, and issued a granting decree in the following form:

> "SANTA FE, January 27, 1788.
>
> I grant in the name of the king, for cultivation and working, the land that the petitioners solicit, the chief alcalde of the Queres, Don Antonia Armenta, placing them in possession thereof, provided that no prejudice whatever results to the Indians or to any of the citizens settled in that vicinity; and, this being done, he will at the end of this decree place the said act of possession, without injury to any third party, to be copied in the government book and written on stamped paper when it reaches this province.
>
> CONCHA."

On February 6 of the same year the chief alcalde aforesaid, with all the formalities required by the law, placed the parties in juridical possession of the tract, with well defined natural boundaries. It does not appear that the whole of the canon was granted, but only a portion of it, to wit: From the waterfall on the north to the junction of the rivers on the south, the east and west boundaries being the sides of the canon.

In 1798 some twenty persons, apparently including the two grantees aforesaid, petitioned the governor in the ordinary form, and, after reciting the fact that there was a quantity of uncultivated land "lying in the Canon de San Diego adjoining the boundaries of the lands belonging to the Indians of the town of Jemez," prayed for a grant of vacant land beginning at the lands granted the Indians of said pueblo.

The then governor, Fernando Chacon, thereupon granted the petitioners the land asked for, with the express condition that they should never sell or alien the same, and directed the same alcalde, Antonio Armenta, to place them in possession under the rules prescribed by law.

On March 14, 1798, the chief alcalde aforesaid, after measuring the league belonging to the Indians at Jemez, found a surplus of 2,100 varas which the Indians claimed without right. He then proceeded to the surplus lands mentioned, and placed the grantees in possession of 300 varas each within certain outboundaries, the latter including the tract granted in 1788. Just after the delivery of juridical possession the alcalde executed and delivered the following certificate to the two Noriegas, the grantees under the grant of 1788:

> "In the Canon de San Diego de Jemes, on the fourteenth day of the month of March, year seventeen hundred and ninety-eight, before me, Antonio de Armenta, and there being assembled all the citizens who took possession in said canon, together with Francisco Garcia de Norega and Antonia Garcia de Norega, two brothers of the first possessors, said two Garcias declared in a loud and clear voice, which all heard, because they shouted

it with much distinctness, and they all unanimously agreed to abide by what was said by the said Garcias, and their reasons were these:

"Friends and brothers, now each one of you is about to take the lands which his majesty has granted and donated to you; but you are all notified that the lands which we first and in our first grant we have been possessing, be all of you aware that I and my brother are going to enjoy the same freely, without any of those present nor their children nor anybody else shall desire to interpose obstacles, and because as first possessors we have the right to enjoy said lands and to cultivate them with full title, as well ourselves, our children, and our successors; and so that none of those who are present may plead ignorance we have so spoken to-day there being no one absent.

"The said Garcias having made all the remarks, all unanimously replied that they asked reasonable justice, and that neither by themselves, their children, nor successors would there be interposed any suit or demand against them at any time, and if they perchance should wish to do so they would take the case until leaving them in peace concerning the said land which they had been so justly possessing.

"All here set forth I, the said chief alcalde, witnessed, for all the citizens declared that it was not to them any imposition that the Messrs. Garcias should enjoy the lands which they were heretofore cultivating, and that it may so appear whenever requisite I make this document in favor of the said two Garcias. I signed the same with those of my attendance in the aforesaid canon in said day, month, and year, to which I certify.

"ANTO DE ARMENTA."

In 1808 it appears that the grantees under the grant of 1798 began to claim title and to encroach upon the possessions of the grantees under the senior grant; and on December 1, 1808, the alcalde of the jurisdiction sent the following communication to Jose Manrique, the governor *ad interim* of the province:

"GOVERNOR: The interpreter of the Navajos, Antonio Garcia, has presented to me a document of grant executed to him by the former alcalde of this jurisdiction,

Antonio de Armenta, under the decree of Don Fernando de la Concha, as appears from the grant itself, and the whole of the Jemez cañon having been settled under an order of Don Fernando Chacon in a royal grant made to them and in which is embraced the land granted to the Garcias, whence results contention between the ones and the others, the latter grantees alleging title to all the land; and I deeming that the title claimed by Antonio Garcia is founded in law, he having been the prior settler for the period of ten years, with the condition that at the time they were given possession all the new settlers gave their consent, as said Garcia makes appear by a document which the alcalde executed to the two brothers and which I inclose to you, together with the grant of the Garcias, so that after seeing the same you may order whatever you shall deem proper, and may, if Garcia has a right to the land claimed, confirm and approve the same, to obviate all question which will necessarily result if the latter be not decided by your superiority, by decreeing whether the land of the Garcias is included or not in the grant of the last settlers, and whether a copy of this grant be taken so that the original, which is the one I enclose, may remain in the archives of the government confirmed by you, and the same should be done with the copy, subject to what you may direct, which will be the best and most correct, your ordering what I shall do to avoid proceedings annoying your attention.

God preserve you many years.

IGNACIO SANCHEZ VERGARA.

Santa Ana, 1st of December, 1808.

Lieutenant-Colonel JOSE MANRIQUE."

On December 13, 1808, the Governor replied to this communication of the alcalde as follows:

Advised of your official communication of the 1st instant and documents you accompany.

I have to state to you that the subject does not require any decision of mine inasmuch as the grant of the Garcias makes their right clear, which grant, being the older, always has the preference.

The last settlers cannot deny to the Garcias the better title, and so these should always remain on the same

grant which they have held hitherto; and if the said new settlers do not coincide you will not permit to them recourse for any such which they may possess they will have to the royal audience of Guadalajara, as the documents referred to were sanctioned by former governors of this province and the said royal audience alone can annul them; with which I answer your official communication aforementioned.

I return to you the documents mentioned that you may deliver them to the party interested.

God preserve you many years.

Santa Fé, 13th December, 1808.

To the alcalde of Jemez.

About the year 1879 the grant of 1788 was presented to the surveyor-general of New Mexico, pursuant to the provisions of the act of July 22, 1854; the title papers and witnesses were produced, and on March 22, 1880, the surveyor-general approved the grant, and certified the same to Congress for confirmation. No action was subsequently taken by that body, and the descendants of the original grantees presented their petition to the United States Court of Private Land Claims under the provisions of the act of March 3, 1891.

Continuous occupancy and possession, by themselves and their ancestors, are shown by Santiago Garcia Montoya, great-grandson of Francisco Garcia de Noriega, and Nerio Antonio Montano, grandson of Jose Antonio Garcia de Noriega.

In the year 1860 the grant of 1798 was confirmed by the Congress of the United States. This, however, was a mere relinquishment of whatever right the United States had.

BRIEF OF ARGUMENT.

The Court of Private Land Claims dismissed the petition in this case, because, as stated in its desision, (1) the grant was not complete and perfect, and (2) it was abandoned by the original grantees.

The appellants contend that the grant was complete and perfect because everything to be done under it by the grantor or grantee was done.

The grant was made by the officer having authority to make it; it was unconditional in terms, and the grantees took possession in due form of law.

There can be no doubt as to the authority of the governors of New Mexico to make grants of land under the Spanish regime. These officers were appointed by the king in person to hold office during five years, and when death or removal from office occurred the viceroy of New Spain appointed a governor *ad interim* to serve out the unexpired term (Bancroft's History of New Mexico and Arizona, 227). The first *conquisitors* and discoverers entered into contracts with the king, by virtue of which they had conferred upon them the title of governor and captain-general, and the power to grant lands and exercise the chief judicial authority in the province (*ibid.*, 94, 95). The contract of Onate, the first governor, so specified (*ibid.*, 116).

This authority to grant lands seems to have been suspended by the royal cedula of 1735, but it was fully restored to the governors by the regulation of October 15, 1754 (2 White, 49).

The power of the governor to make the grant, however, is not denied by the United States, and it is unquestioned by the court in this case. But, says the court:

> "The law of Spain at the time this session was made required that the land should be actually occupied by the grantees and should be cultivated for the period of four years as conditions of obtaining the legal title to the property. It was also required that proof should be made to the audiencia of the district of the fact of compliance with this law, and that the grant should be confirmed by the audencia before the title should pass from the crown. The evidence contains no hint that the Garcias cultivated any part of the tract for the required period, or that any proof of such cultivation had been made, or that the grant had been confirmed by any officer or body having authority in such matters."

The law of Spain requiring four years' cultivation is in the following words (2 White, 38):

"In order to promote the zeal of our subjects in the discovery and settlement of the Indies, and that they may live in that ease and comfort which we desire them to enjoy, it is our will that there be distributed among them houses, lots, lands, caballerias and peonias, to all who shall repair to settle on new lands in the villages and places which shall be designated to them by the governor of the new settlement, making a distinction between gentlemen or esquires and laborers and those of inferior grade and merit, and graduating such grants according to their qualifications and services, in order that they may attend to working the said land and to the breeding of stock, and when said settlers shall have lived and labored in said settlements during the space of four years they are hereby empowered, from the expiration of said term, to sell the same, and freely to dispose of them at their will as their own property."

This law requires no confirmation by the audiencia, or any other body or person. It is a confirmation in itself—the settlers "are *hereby empowered*, from the expiration of said term, to sell the same," etc. And there is no law or regulation requiring that "proof should be made to the audiencia of the district of the fact of compliance with the law as to four years' settlement."

The royal regulation of October 15, 1754 (2 White, 49), wherein the court probably found alleged authority for holding that the grant "should be confirmed by the audiencia before the title should pass from the crown," provides *also* (section 12) that "in the distant provinces, or where the sea intervenes * * * confirmations shall be issued by their governors;" and the regulation expressly confers upon them all the powers exercised by the district audiencias in respect to confirmations.

New Mexico was an outlying, "distant" province of the viceroyalty of Mexico, its seat of government, Santa Fé, being more than one thousand miles from the royal audience at Guadalajara, to which district it belonged. The country was until recently overrun by savages and communication between these points was infrequent, difficult and dangerous, it some-

times taking months to cover the distance. New Mexico, then, being one of the "distant" provinces its governors had power to issue confirmations.

The general practice of the governors, under the laws and the regulation of 1754, was to make grants without condition, leaving the title open to denouncement. If the grantees wished to convey their interests in the land they had, under *law 2, title 12, liber 4*, to show an actual possession of four years, and the governor always inquired into the performance of this condition before he approved the transfer, the approval being, in effect, a confirmation of the grant. If the grantees never wished to convey their interests the question of confirmation never arose. The records of the Land Court and the archives at Santa Fé show that the governors often sat as an "audience *pro tribunali*" on the confirmation on sales of land.

Time and again, prior to the decision in this case, the court below confirmed, as perfect, grants which had never been before the audiencia of the district, or any audiencia, notably among which is the Rancho del Rio Grande (cited by Mr. Justice Murray in his dissenting opinion), a *pasture* grant covering 109,000 acres, wherein the court held that the title was perfect in 1795—that is, the moment juridical possession was delivered.

1. In the absence of all other evidence, that the governor or other proper officer did confirm this grant will be presumed from the fact that the condition of four years' occupancy annexed by the law was fully performed.

As before shown, an actual confirmation was not necessary under the law as to four years' occupancy (*supra*).

The grantees were placed in juridical possession; ten years afterwards they were asserting title to "lands which we first and in our first grant have been possessing;" the grantees under the second grant admitted their claim to the "lands which they had been so justly possessing;" the alcalde states that they had been occupying the land; there can be no doubt that the Garcias were occupying the land at that time (1798);

and the Land Court itself says that "the archive evidence tends to show that the Garcias occupied the tract and did cultivate upon it prior to 1798," but no "opinion can be formed as to *when* the Garcias *commenced* their occupancy or as to the length of time which they continued to cultivate."

The Garcias were given juridical possession of the tract in 1788. Their actual occupancy *then* began, and the court must assume that they "commenced" their occupancy at that time. On these facts—delivery of juridical possession, actual occupancy for an indefinite time, as stated by the court, claim of occupancy and assertion of title ten years afterwards—the presumption arises that the occupancy was continuous from the date of its inception, and can be overthrown only by the most positive evidence to the contrary.

Hence, having performed the condition of four years' occupancy, at the end of that time they were vested with a perfect title, and were entitled to the evidence of that perfect title, whether such evidence was obtainable from the governor as such, or the governor sitting as a district audience, or whether such evidence is now obtainable from the United States of America under the act of March 3, 1891.

2. The proceedings of 1798 tend to show that the Garcias had a perfect title to the land at that time.

In the certificate of the alcalde on the day of possession under the second grant he records the Garcias as saying, "we have the right to enjoy said lands and to cultivate them with *full* title, as well ourselves, our children, and our *successors*." The Garcias were at that time claiming a title in fee. There can be no doubt as to the meaning of this language if used in a will or deed at common law, and it had the same significance in the Spanish colonies.

They were using the words contained in the laws of Spain, before and since that time, to signify a complete and perfect title (Regulation of 1754, sec. 5; Articles 2 and 18, decree of Cortes of January 4, 1813).

Law 2, title 12, book 4, of the Recopilacion de Leyes de las Indias, was in force at the time of this second grant, and it provides as follows:

> "It shall not be lawful to give or distribute lands in a settlement to such persons as already possess some in another settlement unless they shall leave their former residence and remove themselves to the new place to be settled, except where they shall have resided in the settlement during the four years necessary to entitle them to a fee-simple right, or unless they shall relinquish their title to the same for not having fulfilled their obligation; and we declare null and void any distribution which may be made contrary to the provisions of this our law, and we condemn those who make such distribution to suffer our displeasure"

The Garcias certainly did not "relinquish their title to the same for not having fulfilled their obligations," for the certificate of the alcalde shows that they were claiming a title in fee to the land which they possessed under the first grant. This claim is wholly repugnant to the conditions of the grant of 1798, which expressly confers a limited estate—one which the grantees could not enjoy with *full* title and dispose of at will.

They did not "remove themselves to the new place to be settled." On the contrary, the court finds that they insisted on remaining upon and claiming "the particular portion which they had theretofore been cultivating," and that "they were present, participating in the proceedings for the purpose of protecting their rights in the property."

3. The proceedings of 1808 show that the grant had been confirmed, and that the Garcias had a complete title at that date.

The court finds that these proceedings of 1808 were not judicial. But, however that may be, they were certainly "official." The letter from the governor to the alcalde opens and closes by saying that he is advised of and has answered his "official communication."

The alcalde, in his letter of December 1, requests the governor to "confirm and approve the same [grant] to obviate all

question," to which the governor replies that the matter requires no decision on his part, because the grant to the Garcias makes their right clear, and further because the documents were "sanctioned" by former governors of the province and the royal audience at Guadalajara alone had power to *annul* them.

The "former governors," in the order in which they held office, appear to have been as follows: Concha, Chacon (and apparently Concha and Chacon again, in the same order), Alencaster, Maynez (*ad interim*), and then Manrique (*ad interim*). See Bancroft, 284, 268, *et seq.*

It will be remembered that the granting decree of Governor Concha, in 1788, directs the grant documents, after delivery of juridical possession, "to be copied in the government book and written on stamped paper when it reaches this province." The governor, in 1808, on receipt of this letter from the alcalde, as it was his duty to do, and as we must presume that he did, consulted the "government book" and the copy "written on stamped paper," and found that the grant had been "sanctioned" by one of his predecessors and therefore required no confirmation by him.

Webster defines "sanction" as follows:

> "To ratify; to *confirm;* to give validity or authority to."

He points out the only possible remedy of the junior grantees, which is to the royal audience at Guadalajara, the supreme court of the viceroyalty in land matters, representing the person of the king—a sort of king's bench—to which appeals were taken among others from the governors sitting as district audiences.

In passing, it may not be amiss to note the fact that these two documents, taken together, tend to sustain the contention made in a former portion of this argument, to wit, that the governor of the province was authorized to and did sit as a district audience in the confirmation of grants of land. The

alcalde asks the governor to "confirm and approve" the grant, "to obviate all questions which will necessarily result" if it be not done. The governor replies, after consulting the archives, that no such action is necessary, as the grant has already been confirmed, and the only recourse the junior grantees have, *if any at all,* is to the royal audience at Guadalajara, an appellate tribunal. In other words, he says that one of his predecessors has already sat as a district audience in regard to the grant in question, and his action can be reversed by the king only, acting through the audience of the whole viceroyalty.

These communications, as we have insisted, are "official" on their face, and, turning again to the regulation of 1754, the significance of this term becomes apparent. Section 12, as to the powers of the governors in the distant provinces, further provides:

> "The same officers shall also determine the appeals from the subdelegates who shall have been or shall be appointed in each of said provinces and islands, *without recourse being had to the audiencia or chancery of the district*, unless the two decisions be at variance, and then this is to be *officially* and by way of consultation, to avoid the expenses of appeal."

These proceedings show the exact status of the parties at that time. The grant to the Garcias was subsistent and valid, and required a decree of the royal audience to *annul* it. The burden of showing that it was annulled was upon the junior grantees, and the change of flag has not shifted it.

The very action of the governor in 1808, in that he asserts that the Garcias have the better title, is tantamount to a confirmation, even if we assume that it had not been confirmed before.

The two documents which passed between the governor and alcalde are taken from the archives. It appears that the one purporting to be from the governor is not signed, but this does not impair its validity.

In Sutter's case (21 How., 175) the Supreme Court said:

> "Besides this consistent testimony, there is produced from the archives a grant corresponding to that produced from the county records, except in respect to the signatures. The Governor, Alvarado, testifies that this draft was prepared by him, and from the original issued to Sutter so prepared by the secretary, and that the draft was deposited by his direction, and is now there. The fact that his name is not attached to this draft does not impair its authority under the circumstances of this case."

In the case of Spencer *vs.* Lapsley (20 How., 264) the title to a tract of eleven leagues depended on the weight to be given to a paper purporting to be a grant by the Mexican governor of Texas. This paper was taken from the archives of the Texas land office, and was not only unsigned but without date. Yet the court held that the claimant had a complete title to the land in controversy.

A glance at 2 White (148, 152, 236, 239, 248, 453, *passim*) will tend to show that the practice of retaining an unsigned copy of a document for the archives also obtained in Florida and Louisiana.

The court below treats these two documents as genuine, and we think there can be no question in regard to them.

4. This grant was perfect in 1814.

Under the constitution adopted in 1810, for the first time in its history, New Mexico was entitled to a *deputado*, or representative, at the Spanish cortes. Pedro Bautista Pino was chosen as such, and started on his mission in October, 1811. His influence soon asserted itself, and New Mexico became an object of some importance in the councils of the kingdom. In November, 1812, he presented to the cortes a lengthy and able report on the condition and needs of his province (Bancroft's New Mexico, 288). As a result of this, on January 4, 1813, the cortes decreed that all lands thereafter granted or distributed should be in *full* property; and on June 8, 1813, the same policy was extended to every grant made up to that time, in the following words:

> "All pastures, farms, and other lands of any kind, pertaining to private ownership, whether free or entailed, are declared from now henceforth closed and perpetually confirmed, and the owners and possessors are authorized to inclose them without prejudice to the roads, watering-places, crossings and drains, enjoy them freely and exclusively or rent them, as they may desire, and dispose of them for the purpose of labor, pasturage, or planting, or to the use which is most advantageous to them," etc.

If the grant to the Garcias had not been confirmed prior to the date above-mentioned, this decree dispensed with the necessity of obtaining a confirmation from the district audience, the royal audience, or the king in person.

It will be noted from the record that in the year 1807 (53, f. 94) Francisco Garcia de Noriega, one of the original grantees, was killed by the Indians (27, f. 46; 48, f. 88; 61, f. 107), and it was within a year following the death of this old frontiersman that his brotherly neighbors began to encroach upon the rights of his heirs and of his co-grantee.

ABANDONMENT.

The ground upon which the decision of the court ultimately rests is that of abandonment, and this abandonment is founded upon the assumed fact that the alcalde in 1798 could not have placed the junior grantees in possession of 6,000 varas without encroaching upon the land granted in 1788. It is also assumed that the tracts of 300 varas each were not measured in the form of a square, but that they were laid off according to the custom in that section of country—that is, 300 varas north and south, the sides being the limits of the grant.

The alcalde in 1798 does not say that the distance between the north boundary of the Indian league and the junction of the rivers is 2,100 varas, but that he found a surplus of 2,100 varas "which they had *before* arriving at the Canon de San Diego, all of which they claimed as their own without having

any right to them in any manner." This language can hardly be held to have *no* other meaning than that between the Indian league and the *junction of the rivers*, there were but 2,100 varas.

The court was undoubtedly misled in this respect by the testimony of Jesus Trujillo, for the defendants, who testifies as follows after stating that the "canon" is at the junction of the rivers (56, f. 100):

> "Q. Do you know where the north line of the Indian pueblo lands are in that vicinity?"
> "A. Yes, sir."
> "Q. How far is it from the *canon?*"
> "A. About 400 yards only."
> (57, f. 101).
> "A. They have found that there are 2,100 varas from the Indian league to the junction of the rivers."

J. W. Miller, for the defendants, a much more intelligent witness, testifies as follows (71, f. 121):

> "Q. How far is it from the pueblo of Jemez to the junction of the rivers?"
> "A. Five miles."

If the witness meant that it was five miles from the north line of the Indian lands to the junction of the rivers, then there was ample space to lay off 6,000 varas between these two points. If, on the other hand, he meant that it was five miles from the center of the Indian league, then, according to the way these "leagues" were measured, we have at least two miles, about 4,000 varas, between the north boundary of the Indian lands and the junction of the rivers.

This testimony should have raised a doubt in the mind of the court as to the correctness of Trujillo's statements, who first says that the distance is 400 yards and then says it is 2,100 varas.

The Indian town was in existence in 1798, just as it is to-day, and had been for more than a hundred years prior thereto,

and a league laid off in a northerly direction from its church or center would cover precisely the same ground as it does now. The junction of the rivers is still there.

The south boundary of the tract granted in 1798 is the north boundary of the Indian league. There is in the record a plat taken from the surveyor-general's office which shows the lines of both tracts as officially surveyed (51), one within the other. It shows the junction of the rivers and the south boundary of the tract granted in 1798. A glance at this plat will show that the distance from the south line of the large tract to the junction of the rivers, the south boundary of the tract granted in 1788, is about half the side of a township, the lines of which are on the plat, or three statute miles, which is just sufficient to lay off 6,000 varas of 33 inches each, when we take into consideration that the alcalde, according to the custom of those days, followed the course of the river.

The maps of New Mexico, as published by the General Land Office, clearly disclose this well-known geographical fact. of which the court will take judicial notice.

The theory of abandonment, therefore, being based on an assumption which is wholly at variance with the record and with the geography of the country, must fall to the ground.

In reasoning from this mistaken geographical fact as a premise, the court assumes several other facts which are clearly at variance with the record. We will quote from the decision and point out one or two as we proceed:

> "There are many considerations apparent upon the face of the record bearing upon this question [of abandonment]. The petition for the grant—1798—*signed by the two Garcias*, described the land petitioned for by specific, known natural boundaries, and as being situated in the Canon de San Diego adjoining the boundaries of the lands of the Indians. There was no exception or reservation of the land described in the former grant to the Garcias. The boundaries specified clearly embraced the Garcia tract. The south boundary was south of it, the [north] boundary north of it, the east boundary east of it, and the west boundary west of it."

In the first place, the petition for the grant of 1798 was *not* "signed by the two Garcias." It is in the record, and is *signed by Jose Miguel Garcia alone*, who seems to have been a brother of the two senior grantees.

The petition asked for "vacant land," and the alcalde placed the grantees in possession of "vacant" land without encroaching upon the possessions of the Garcias, as already shown. The proceedings of 1798 show that the small tract was not "vacant."

Even if the grantees had not asked for "vacant land," the tract first granted having already been segregated from the public domain of Spain by virtue of a granting decree and juridical possession under and in accordance with the forms of law, no "exception or reservation" was necessary. It is hardly necessary to cite authorities on this fundamental proposition, and we will merely refer to Mr. Justice Murray's dissenting opinion (43, f. 78).

The court continues:

> "Looking at the face of the petition, then, the governor was justified in regarding it as in the nature of a request to him on the part of the Garcias to make to the twenty petitioners a grant of the whole tract within the boundaries specified, and as a waiver or release of all claim to any part of the lands by virtue of the grant of 1788. This consideration may explain the peculiar language used in the order making the grant. He says: 'In view of the foregoing petition in regard to settling in the Canon de San Diego, where the interpreters of the Navajos were temporarily stationed, I grant the aforesaid lands with the express condition that it be settled by at least twenty citizens, and the lands are to be distributed in equal parts.' This seems to show that the central feature of the grant was the exact land which had theretofore been occupied by the Garcias in the Canon de San Diego."

The peculiar language of the grant in regard to the settlement of the tract by at least twenty persons, was because, as

before stated, the petition was signed by one man only, and the governor wished to be sure that the alleged object of the petition was carried out, viz: that at least twenty citizens should receive the large tract of land and not one man only, and that the signer of the petition should not receive more than one-twentieth of the whole.

The presumption that it was the exact land covered by the grant of 1788 does not arise from the mere use, by the governor, of the words "Canon de San Diego [de Jemez] where the interpreters of the Navajos were temporarily stationed." Even if "interpreters of the Navajos" and "the Garcias" were convertible terms, it does not follow that the tract granted in 1788 was meant, for the Garcias may have been "stationed" between the Indian league and the junction of the rivers prior to the time of their petition for the senior grant—in fact, it may have given them the opportunity to discover that the land they asked for in 1788 was vacant. And it is nowhere in evidence that the grant to the Garcias included the whole of the Cañon de San Diego—on the contrary, it was a tract of land within the cañon, with fixed, natural boundaries. This fact is constantly lost sight of by the court below.

Then, too, there was not the slightest evidence before the governor that the land granted to the Garcias had been abandoned, and to say that this dictum would divest them of their rights in the premises is repugnant to the rule adopted in this very case by the court below as to the proceedings of 1808, to wit:

> "To say that such a proceeding was a judicial determination affecting property rights, was binding on the crown or anyone else, would be an imputation upon Spanish justice and Spanish law. The governor may have been the supreme judicial officer of the province, but he was bound by rules of judicial procedure, and had no power to affect property rights without a hearing."

The court further says:

> "The letter of Vergara to the governor shows that the whole of the Cañon de San Diego was settled under the grant of 1798."

What the alcalde does say is that "the whole of the *Jemez* cañon having been settled," etc., not the "whole of the Cañon de San Diego." The Jemez river—and from the river the cañon takes its name—begins at the confluence of the San Diego and Gaudalupe creeks (24, f. 41; 25, f. 43; 49, f. 89; 56, f. 100), and flows southward to the Indian league; so that when the alcalde asserted that the whole of the "Jemez" cañon had been settled under the junior grant, he asserts merely what the evidence shows, to wit, that all the land between the Indian league and the junction of the rivers was settled. This is another geographical fact which the official maps of New Mexico disclose, and of which the court will take judicial notice.

In some mysterious manner the court construes the proceedings of 1798, so far as the Garcias were concerned, into a "contract" with the grantees under the second grant, and then proceeds.

> "The suggestion may occur to the mind that, as the petition asked for 'vacant and uncultivated' land, this operated as a reservation of the land covered by the first grant from the second grant. If this was the understanding of the Garcias themselves (1) why did they require the contract from their co-grantees guaranteeing in the distribution to them the particular part they had cultivated, and (2) why did they permit the new settlers to take possession of the whole cañon, and (3) why did they accept 300 varas as their part in the distribution?"

The court fails to find satisfactory answers to these questions and confirmation is therefore refused.

(1) The record discloses not the slightest evidence of any "contract" between the Garcias and their co-grantees. The

notice given by the Garcias in 1798 was after the junior grantees had been placed in possession of their 6,000 varas, for the alcalde says: "There being assembled all the citizens who *took* possession of the said cañon," etc. The Garcias were there claiming the lands which they had been possessing under their first grant, to "enjoy said lands and to cultivate them with full title, as well ourselves, our children and our successors." It would be absurd and idle to give this warning if their lands were already taken from them and allotted to the junior grantees. The court finds that they "were present, participating in the proceedings for the purpose of protecting their rights in the property." "Their rights in the property" were their rights under the grant of 1788.

(2) The new settlers took possession of the "whole of" the Jemez cañon, as indicated by the alcalde's certificate. Their 6,000 varas were laid off between the north boundary of the Indian league and the junction of the rivers, the south boundary of the tract granted in 1788. The grant of 1788 did not cover the whole of the Cañon de San Diego, but a portion of it only, between fixed boundaries, and this fact is more apparent when we look at the testimony of the defendants' witnesses, one of whom states that the Cañon de San Diego reaches the Indian league. The tract granted in 1788, however, was three miles beyond that point.

(3) The two Garcias had a perfect right under the law of Spain to "accept" 300 varas under the second grant, and still retain their possessions under the first. The law in force was *law 2, title 12, liber 4*, quoted in full *supra*.

This law requires merely that the settler shall have resided on the tract for the four years necessary to entitle him to a fee-simple right. As already clearly shown, the Garcias did not "leave their former residence." They did not "relinquish their title to the same for not having fulfilled their obligation," for they were there claiming a fee-simple right, apparently under this law, and everyone present admitted that right.

Then, having resided on the land four years, they could accept 300 varas under the second grant without in any manner jeopardizing their rights under the first.

POSSESSION.

The documentary evidence shows that the Garcias were placed in juridical possession in 1788; that ten years afterwards they were still in possession; and that ten years after that, or twenty years from the time of making the grant, they or their heirs were still in possession.

Santiago Garcia y Montoya, great-grandson of Francisco Garcia de Noriega, a witness for the claimants, testifies that he was born upon the smaller tract about 1827 and lived there for twenty years (24, f. 46); Antonio Garcia de Noriega, one of the original grantees, also lived on the tract with his family, and died there in the year 1835, after which his family moved nearer the junction of the rivers; he saw the grant papers in the hands of Nerio Antonia Montoya about the year 1840.

Nerio Antonio Montoya, grandson of José Antonio Garcia de Noriega, the other original grantee, lived on the land from 1822 with his mother, the daughter of José Antonio Garcia de Noriega; she died in 1852; the grant papers were in possession of his grandfather, on whose death they passed to his mother, and then to him; he has improvements upon the tract; lived upon and cultivated it until 1879.

Jesus Trujillo, for the defendants, testifies that he lives "at the Cañon de San Diego" (56, f. 99), but he afterwards states that he lives at the edge of the Indian league (57, f. 101), which is below the junction of the rivers, and entirely outside the smaller tract (59, f. 104). It is attempted to prove by this witness that an adverse possessor, José Francisco Archuleta, occupied and cultivated lands within the boundaries of the tract granted in 1788, but he says that Archuleta's residence was 600 yards north of the "springs" (63, f. 109), and the springs he refers to are not within the small tract (61, f. 107).

The next witness, Emiterio Archuleta, shows that there was but one man, so far as he knows, who lived on the smaller tract during the whole time he knew it; however, he was not born until 1847 (64, f. 110). This man is the son of Archuleta, who resided 600 yards north of the "springs," and outside the smaller tract; in any event, his father did not go there until 1865 (64, f. 111); before that he resided in the Cañon de Guadalupe (67, f. 115), where he lived all his life until he went up near the springs (59, f. 104), and where the witness was, therefore, born—not on the smaller tract, as his testimony would lead one to believe (64, f. 110). The Cañon de Guadalupe is not within the small tract.

Francisco Perea, the next witness, shows that the town of "Cañon" is located in the Cañon de Guadalupe (68, f. 116); there was no one living in the Cañon de San Diego, so far as he knows, from the first time he knew anything about the small tract until 1864 or 1865, when José Francisco Archuleta, the settler near the "springs" above referred to, went there to live.

Juan Martin, the next witness, shows that the land which he inherited from his father lies in the Cañon de Guadalupe (70, f. 119), which, as before stated, is outside the small tract.

It is sought to prove by J. W. Miller (71, f. 120) that Juan Martin, who just testified, lives within the smaller tract, but this he utterly fails to do; and, wherever Martin lives, he has been there but nineteen years, long after the change of flag (71, f. 121).

Antonio José Garcia testifies (72, f. 121) that he and his wife are descendants of the two original grantees of 1788; the land he holds by purchase is below the junction of the rivers (72, f. 122), and outside the small tract.

J. W. Miller is recalled, but the land claimed by him is not shown to be within the smaller tract (73, f. 123, 124); the Archuleta land has already been shown to be outside the small tract, and Archuleta did not acquire possession until after

1864; he does not know whether his grantors claim as heirs of the grantees of 1788 or by right of squatter sovereignty.

Jesus Trujillo, the first witness, is recalled (73, f. 124), but he utterly fails to discriminate between "Cañon de San Diego" and the small tract. He has already testified (57, f. 101) that when he was a boy he did not know of or see any one occupying land north of the junction of the rivers, but he did see some people there 17 years before he was born, and that when the people returned in 1843 they did not settle on the smaller tract (62, f. 108); after bethinking himself over night, however, he says (73, f. 124) he saw some persons living in the "Cañon de San Diego" "from the year twenty," when he was about five years old; some were living north of the junction of the rivers, and some south of it, but it is difficult to persuade him to tell which is which. These people were apparently driven off by the Indians in 1837 (74, f. 125):

> "Q. When did they return?
> "A. In the year '43.
> "Q. What did they do when they came back?
> "A. They made the small towns in the Cañon de San Diego and the Cañon de Guadalupe.
> "Q. What are those towns now called?
> "A. Cañon de San Diego and Cañon de Guadalupe."

In the absence of evidence to the contrary, it must be assumed that they "returned" and "went back" to the place they left when driven off. This witness has already shown that when they "returned" and "went back" they did not settle on the small tract (62, f. 108); he resides wholly outside the smaller tract (59, f. 104), and knows very little about it (63, f. 109). Archuleta resided at El Rilleto all his life until he went to the "springs;" he did not go to the springs until 1865 (59, f. 104); up to that time he resided in the Cañon de Guadalupe (67, f. 115); hence it follows that El Rillito, which this witness states is "above the junction of the rivers" about "two thousand varas" in the "Cañon de San Diego" is

entirely outside the small tract. This is the same witness who testified that it was but 400 varas from the Indian league to the junction of the rivers, and afterwards states that it is 2,100 varas between the same points; both of which statements are shown to be absolutely false by the testimony of J. W. Miller (an American witness apparently), by the plat in the record and by the maps of the country as published under authority of the United States, as before shown. He has "Cañon de San Diego" on his mind, and calls everything within the boundaries of the large tract "Cañon de San Diego," "cañon," "Cañones." The same thing may be said of all these Mexican witnesses, as clearly disclosed all through the record, and their testimony should be very carefully weighed by the court.

B. S. Rodey, attorney for some of the defendants, claims through Archuleta, whose lands are not within the small tract; and, if they are, he did not settle until 1865, long after the change of flag.

In conclusion, we respectfully refer to the able dissenting opinions of Justices Stone and Murray (34, 35).

We submit that this grant has long been complete and perfect, by virtue of the laws of Spain, including prescription, and should be confirmed as such.

Respectfully submitted,

HENRY M. EARLE,
Attorney for Appellants.

ASSIGNMENT OF ERRORS.

1st. Error in holding that Grantees relinquished their rights under the grant of 1788.

2nd. Error in finding contrary to the evidence produced.

3rd. Error in holding that Grantees ever aban[illegible]ned tract prior to 1798.

4th. Error in holding that Grantees ever abandoned tract.

5th. Error in not holding title was perfect at date of change of flag.

6th. Error in not holding that Grantees had perfect title by prescription.

7th. The Court erred in not holding that the Petitioners in this case were entitled to a confirmation of their grant.

8th. Error in not holding title perfect in 1798.

9th. Error in not holding title perfect in 1808.

10th. Error in not holding title perfect in 1813.

11th. Error in not holding title to be perfect at ~~time of~~ date of change of flag.

12th. Error in findings wholly at variance with the record.

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

AMADO CHAVES ET AL., APPELLANTS,
v.
THE UNITED STATES ET AL. } No. 4.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

STATEMENT, ABSTRACT, AND BRIEF ON BEHALF OF THE GOVERNMENT.

The plaintiffs, AMADO CHAVES, ROMAN BACA, F. MANZANARES, AUGUSTIN DEL VALLE, and FLORENCIO SANDOVAL, filed their petition in the Court of Private Land Claims for the confirmation of what is known as the CAÑON DE SAN DIEGO tract, situated in the county of Bernalillo and territory of New Mexico, claiming the same as the heirs and legal representatives of Francisco Garcia de Noriega and José Antonio Garcia de Noriega, alleging that prior to January 27, 1788, the aforementioned parties presented their petition to governor Concha, praying for the grant of a tract of land known as the

Cañon de San Diego; that on the 27th day of January of said year the governor granted the tract to the petitioners, and directed the chief *alcalde* of the Queres, Don Antonio Armenta, to place them in juridical possession thereof; that on the 6th day of February of said year the said Armenta, in conformity with the order of governor Concha, delivered to said petitioners, Francisco and José Garcia de Noriega, juridical possession of the land named in said grant and pointed out the boundaries as follows:

> On the north side the water leap (*salto del agua*), on the south side the junction of the rivers, and also a point of a red *mesa* and the lands of the said Indians, and with respect to the east and west there are only some very high *mesas* on both sides of the *cañon*, and these serve as the boundary lines. (R., 1.)

It is alleged that thereafter they remained in possession of the tract during their lifetime, and since their decease said premises have been in the exclusive possession of their heirs and representatives; that the said grant was perfect and invested them with complete title.

It is further alleged that on the 6th of March, 1798, the said Garcias, having been in exclusive possession of said tract for a period of ten years, jointly with four more brothers and fourteen additional persons, petitioned the governor of the province, Don Fernando Chacon, for a grant of land to be known as the Town of the Cañon de San Diego, comprising 116,288 acres, more or less, and embracing within its confirmed outboundaries the tract known as the Cañon de San Diego, which had been

granted before to the said Garcias on January 27, 1788, by governor Concha. That on the said 6th day of March, 1798, governor Chacon granted to the petitioners, numbering in all twenty, the said tract known as the grant to the Town of the Cañon de San Diego; that on the 14th of March of said year, juridical possession was granted to said last-mentioned grantees by the chief *alcalde*, Antonio de Armenta, which has since been known as the grant to the Town of the Cañon de San Diego, with the exception of so much thereof as had prior thereto been granted to Francisco and Antonio García de Noriega, and had been in their possession from the time the same was delivered to them by the chief *alcalde* in 1788.

It is further alleged that said grant of March 6, 1798, was confirmed by congress on January 21, 1860, and that on the 31st of December, 1877, the heirs and legal representatives of Francisco and José Antonio García de Noriega, claiming to own the tract of the Cañon de San Diego under the grant of governor Concha of January 27, 1788, presented their claim to the surveyor-general under the eighth section of the Act of July 22, 1854, and that on March 22, 1880, the surveyor-general decided the same to be valid, and recommended its confirmation by congress, and it is alleged that he decided that the larger grant of March 14, 1798, did not convey the title of the lands granted in 1788 to the Garcias, who had been placed in juridical possession of said tract known as the Cañon de San Diego, by order of governor Chacon in 1788. That said Cañon de San Diego tract was surveyed in 1880,

which survey was approved by the surveyor-general and sent to congress with his report for confirmation, and it appears from said survey that said Cañon de San Diego tract contains 9,752.57 acres. That no further action has been taken relative to the same by the authorities of the United States.

It is alleged that diligent search has been made for the original *borrador*, the archive copy and evidence of said grant, and that the same has not been found, by reason of the notoriously incomplete and mutilated condition of the Spanish and Mexican archives in the territory; that the original *testimonio* delivered to the parties as evidence of title remained in their possession, and that of their descendants and legal representatives, and was afterwards filed in the office of the surveyor-general of the territory of New Mexico, copy of which was made and offered by plaintiffs in evidence. Copies of the proceedings had before the surveyor-general, seeking the confirmation of said grant, were duly filed and marked Exhibit "B." After other formal allegations, the usual prayer for relief follows. (R., 1–4.)

By way of answer, the United States alleges want of knowledge or information sufficient to enable it to form a belief as to whether the petitioners are the heirs and legal representatives of the said Garcias, or whether on January 27, 1788, governor Concha granted the land described in the petition. It denies that Antonio de Armenta, chief *alcalde*, did, under the order of governor Chacon, on the 6th day of February, 1788, place the said Garcia brothers in juridical possession of said land, and denies that the same remained in their possession dur-

ing their natural lives, and that the same since their death has been in the exclusive and lawful possession of their heirs and legal representatives, or that the same was a perfect, or even an imperfect grant, and avers that there never was a grant at all, as alleged in said petition, in 1788. Further answering, the government admits that on the 6th day of March, 1798, said Garcia brothers above mentioned, jointly with eighteen others, petitioned the governor of the province, Don Fernando Chacon, for a grant of land to be known as the Town of Cañon de San Diego grant, but says that it is not true that at said time, as alleged, said Garcia brothers were lawfully in the possession of the premises alleged to have been granted to them in 1788, and that it is not true that the said Town of the Cañon de San Diego grant was petitioned for as an additional grant to the grant of the tract of Cañon de San Diego of 1788. It is averred that the said grant of 1798 embraces within its outboundaries the entire grant sued for in this case.

It is admitted that juridical possession was given to the twenty original grantees of the Town of the Cañon de San Diego grant, but denies that any exception of any kind or character whatever was made in the latter grant to the said twenty grantees, but, on the contrary, it avers that the said Town of the Cañon de San Diego grant, which includes and surrounds the grant sued for, does not make any reference thereto or any reservation thereof, as alleged.

Further answering, it says that if such a grant as alleged was ever made to said Garcia brothers in the year 1788, the same was never accepted, or if it was, it

was abandoned prior to and at the time they joined eighteen others in petitioning for the larger grant which was made in 1798. Further answering, it says that said Garcia brothers, as petitioners for and grantees of the grant of 1798, took each an allotment or *suerte* of land to cultivate and live upon, which was given out in severalty to each of said twenty petitioners in 1798, which said allotments constitute no part nor are they directly connected with the land alleged to have been granted to them in 1788, but are about three miles south of the south line, as claimed by the plaintiffs.

Further answering, the defendants allege that the heirs and legal representatives of the twenty alleged grantees of the grant of 1798, in the year 1859, under the provisions of law, presented their claim through the proper channels, and it was duly reported to congress and the same was confirmed on the 21st day of June, 1860, and thereafter patented to the heirs and representatives of the said alleged twenty grantees, two of which grantees were the grantees of the alleged grant of 1788; that by said act of confirmation of 1860 and by the patent issued thereunder the United States has parted with whatever right, title, or interest it may have had to the same under the treaty of Guadalupe Hidalgo.

Further answering, it says that the heirs and legal representatives are estopped to assert title against the United States for any portion of said land included within the patent of the Cañon de San Diego grant, and they, having failed to apprise the United States of any claim thereto, and having accepted the release of the United States under the grant of 1798, it constitutes an

acquittance under the treaty of Guadalupe Hidalgo, and therefore this claim is not one over which the Court of Private Land Claims has jurisdiction. The United States enters a disclaimer of any interest in and to the land included within the Town of the Cañon de San Diego, patented, as aforesaid, in 1860, and it is therefore not one which, under the laws of nations, the treaty of cession, or the principles of equity, is entitled to confirmation. (R., 6–10.)

Under the provisions of the Act of March 3, 1891, creating the Court of Private Land Claims and conferring jurisdiction upon it, it is provided in section six that "a copy of the petition, together with the citation, shall be served upon any adverse possessor or claimant, the same to be served upon such possessor or claimant in the ordinary legal manner of serving such process in the proper state or territory," etc. Under this provision, a large number of persons claiming to own the Town of the Cañon de San Diego grant, made in 1798, were made co-defendants with the government, who filed the answer to the petition. The answer of these co-defendants is substantially the same as that of the United States.

As a copy of the original Spanish of these granting documents has been omitted from the record, and the government contends that the translation of the granting decree is incorrect in a material part, I herewith insert a correct copy in Spanish of the grant, together with the translation which the government contends to be correct, and present a certificate from the clerk of the Court of Private Land Claims, which is on file with the clerk of this court.

Document No. 5, in Private Land Claim Reported No. 122. The Cañon de San Diego grant, which document is on file in the office of the United States surveyor-general at Santa Fé, New Mexico, being a grant made to Francisco and José Antonio Garcia de Noriega in the year 1788.

Sor. Govor. Dn. FERNANDO DE LA CONCHA:

Franco. Garcia de Noriega, ynterprete de los Navajoes, y José Anto. Garcia de Noriega, con el mas devido respecto ante Vsa., parecemos y decimos, Señor, qe. hallandose un cañon, que le llaman de Sn. Diego, bacante y haviendo visto en él que se puede proporcionar labor, y pastarr algunos Animales nos rendimos á las Reales plantas de la grandeza de Vsa. Solo á pedir y suplicar, el que se digne en nombre de S. M. de favorecernos, con darnos el dicho cañon, para lo dho. por hallarnos fallos de tierra para sembrar, y mereciendo el qe. S. M. nos favoresca. Pedimos por merced el dho. Cañon por todo lo qual

A Vsa. Pedimos y suplicamos sea muy servido el mandar hacer como pedimos que en hacerlo assi; Reciviremos gran bien y merced &a.

FRANCO. GARCIA DE NORIEGA. (Rúbrica.)
JOSÉ ANTO. GARCIA. (Rúbrica.)

STA. FÉ, *27 de Eno. de 1788.*

Concedo en nombre del Rey el cultivo y Labor de la tierra que solicitan los Suplicantes, poniendoles en posesión de ella el Alcalde Mayor de los Queres, Dn. Antonio Armenta, siempre que no resulte perjuicio alguno á los Yndios, y vecinos establecidos en aquellas immediaciones, y que verificado assi, ponga á continuación de este decreto, la citada toma de posesión sin perjuicio de tercero, para copiarlo en el Libro de Govierno, y asentarlo en papel sellado quando llegue á la Provincia.

CONCHA. (Rúbrica.)

En este Cañon de San Diegó, en seies dias del mes de Febrero de mil setecientos ochenta y ocho años, Yo, Dn. Antonio de Armenta, Alcalde Mayor y Capitan á Guerra de la Jurisdición de los Queres, en Virtud de la facultad que me es conferida por el Señor Dn. Fernando de la Concha, Cavallero Comendador de Mora en el Órden de Santiago, Theniente Coronel de los Reales Exercitos, Governador Politico y Militar de esta Provincia del Nuebo Mexico, allandome en el expresado cañon con sitación de los hijos del Pueblo de Xemes, que son los conlindantes con dicha tierra y abiendoles señalado lo que era suio quedaron mui conformes, por no recevir agrabio ninguno en que se de dicho cañon, y tambien saber que es la mente de Nuestro Soberano que sus tierras se pueblen con sus Basallos, en aquello sobrante que hubiere, y no hallando yo ympedimento ninguno que pudiera estorbarlo, y usando de la facultad que me es conferida pasé á dicho Cañon de San Diego y no resultando quien mejor derecho tubiera ni tampoco aber perjuicio de tercero que saliera al reparo, y estando presentes dichos Yndios, Francisco Garcia de Noriega, ynterprete de los Navajoes, y su hermano Josef Antonio Garcia de Noriega, y entendidos de todo los coxí de la mano, los pasié por dichas tierras, arancaron sacate, tiraron Piedras á los quatro bientos y diximos todos á una tres veses, Viva el Rey, Nuestro Señor (Q. D. G.) en señal de verdadera posesión la que aprendieron quieta y pacificamente sin contradición alguna, siendo sus linderos los siguientes: por la parte del Norte, el Salto del Agua; por la parte del Sur, la Junta de los Rios, con mas una punta de una Mesa Colorado, y tierras de dichos Yndios; por lo que mira de Oriente á Poniente no hay mas de solo unas Mesas muy altas, de hambos lados del Cañon, que estas sirben de linderos y no resultando perjuicio alguna quedaron conformes con ellos, y para que asi conste, lo firmé Yo, dicho Alcalde Mayor, Dn. Antonio de Armenta, á una con dos testigos

de mi assa., con quienes autuo á falta de escribano Publico ni Real, que de ninguna clase los hai en toda esta Governación, que de todo doi fee.

Entre renglones, Rio, Vale. (Rúbrica.)

ANTONIO DE ARMENTA. (Rúbrica.)

To.: SALVADOR ANTO SANDOBAL. (Rúbrica.)
To.: NICOLAS ORTIZ. (Rúbrica.)

Translation of Document No. 5, in Private Land Claim Reported No. 122. The Cañon de San Diego grant, which document is on file in the office of the United States surveyor-general, at Santa Fé, New Mexico, being a grant made to Francisco and José Antonio Garcia de Noriega in the year 1788.

Señor Governor DON FERNANDO DE LA CONCHA:

We, Francisco Garcia de Noriega, interpreter for the Navajos, and José Antonio Garcia de Noriega, with the most profound respect appear before your Excellency and state, sir, that a *cañon* which is called San Diego being found vacant, having seen that cultivation may be had and some animals pastured therein, we prostrate ourselves at the royal feet of your Excellency's grandeur solely to ask and pray that you deign in the name of his Majesty to favor us by giving us the said *cañon* for the purposes mentioned, on account of finding ourselves lacking land for planting, and deserving that his Majesty should favor us we ask as a grant the said *cañon;* on account of all which we ask and pray that your Excellency be well pleased to command that what we request be done, that by your so doing we shall receive great benefit and favor, etc.

FRANCISCO GARCIA DE NORIEGA. (Scroll.)
JOSÉ ANTONIO GARCIA. (Scroll.)

SANTA FÉ, *January 27, 1788.*

I grant, in the name of the King, the cultivation and working of the land which the petitioners ask for, the chief *alcalde* of the Queres, Don Antonio Armenta, placing them in possession thereof, provided that no prejudice results to the Indians and residents settled in that vicinity, and it having been so done, following this decree he shall place the said taking of possession without prejudice to a third party, in order to copy it in the government book, and to write it out on stamped paper when the same shall reach this province.

CONCHA. (Scroll.)

At this Cañon of San Diego on the sixth day of the month of February, of the year one thousand seven hundred and eighty-eight, I, Don Antonio de Armenta, chief *alcalde* and war captain of the jurisdiction of the Queres, by virtue of the authority that is conferred upon me by Señor Don Fernando de la Concha, Knight Commander of Mora in the order of Santiago, lieutenant-colonel of the royal armies, civil and military governor of this province of New Mexico, being at the said cañon, having cited the natives of the *pueblo* of Jemez, who are the adjoining owners to said land, and having designated to them that which was their own they were well suited on account of receiving no injury by the giving of said *cañon*, and also knowing that it is the will of our sovereign that his lands be peopled by his vassals in whatever surplus there may be, and finding no obstacle whatever that could interfere with it, and exercising the authority that is conferred upon me, I went to said Cañon of San Diego, and no one appearing who had a better right, nor there being any prejudice to a third party who might make objection, and said Indians, Francisco Garcia de Noriega, interpreter for the Navajos, and his brother,

José Antonio Garcia de Noriega, being present and understanding it all, I took them by the hand, I conducted them over said lands, they pulled up grass, threw stones to the four cardinal points, and we all said together three times, "Long live the King, our Lord (whom may God preserve)," as evidence of true possession, which they received quietly and peaceably without any opposition, their boundaries being the following: On the north side, the waterfall (*salto del agua*); on the south side, the junction of the rivers and also a point of a red table-land (*una mesa colorada*), and lands of said Indians. With respect to the east and west there is nothing more than some very high table-lands on both sides of the *cañon*, which (table-lands) serve as boundaries. And, there resulting no prejudice whatever, they were satisfied with them (the boundaries); and in order that it may so appear I, said chief *alcalde*, Don Antonio de Armenta, signed it, together with my two attending witnesses, with whom I act for lack of a public or royal notary, of which there is none of any kind in all this government, to all of which I certify.

The interlineation "River" is valid.

ANTONIO DE ARMENTA. (Scroll.)

(Armenta's Scroll.)

Witness: SALVADOR ANTONIO SANDOVAL. (Scroll.)
Witness: NICOLAS ORTIZ. (Scroll.)

At Santa Fé, on January 27, 1788, governor Concha, by said decree, grants to the Garcias "*the cultivation and working of the land*," and authorizes Armenta to place them in possession thereof, provided no prejudice shall result to the Indians or residents of the vicinity, which having been done he shall indorse the act of possession following the decree, in order that it might be kept in

the government book, and he instructs him to write it out on stamped paper when he shall have reached the province.

On the 6th day of February, 1788, chief *alcalde*, Armenta, in conformity with the decree of January 27, 1788, having notified the natives of the *pueblo* of Jemez, who were the adjoining owners of said grant, and having designated to them what was their own, they were satisfied, because they were not injured, and finding no further obstacle he proceeded to place Francisco Garcia de Noriega, interpreter for the Navajos, and his brother, Antonio Garcia de Noriega, in the possession of said *cañon* and defined the boundaries thereof.

It will be noticed that the claimants translate the first line of the granting decree of January 27, 1788, "I grant, in the name of the King, for cultivation and working, the land which the petitioners solicit," while the original Spanish is, "*Concedo en nombre del Rey, el cultivo y labor de la tierra que solicitan los suplicantes*," and it is plain to be seen that the preposition "for" can not be used in the translation. When we come to construe this grant in connection with the language used in the granting decree of 1798, the importance of a correct translation will be seen.

About ten years subsequent to the making of this alleged grant, it appears that Francisco and Antonio Garcia de Noriega, interpreters of the Navajo nation, in unison with José Miguel Garcia and seventeen others, petitioned the governor of the province of New Mexico, stating that there was a quantity of vacant and uncultiv-

vated land lying in the Cañon de San Diego, adjoining the boundaries of the land belonging to the Indians of the town of Jemez, and that the settlement thereof would be beneficial to the province and advantageous to their families and descendants, by settling up the lands with their property and cultivating the same, and they asked the governor to grant this for settlement by the persons named therein, and to order that the boundaries be the boundaries of the land granted to the Indians of the *pueblo* absolutely to the middle *arroyo* called Los Torreones, and the line running from north to south to the Vallecito de la Cueva, which is in front of the waterfall and in a transverse line from said middle *arroyo* to the Rito de la Jara. (R., 37.)

It will be noticed that nothing is stated in this petition about Francisco Garcia de Noriega having any interest in the property in the Cañon de San Diego by virtue of the grant of 1788, or any other grant; on the contrary, the statement is made, to which they are a party, that the land was *vacant and uncultivated*. Upon this petition governor Chacon indorsed the following decree:

> In view of the foregoing petition made by José Miguel Garcia and other citizens therein mentioned, in regard to settling in the *cañon* known as San Diego de Jemez, WHERE THE INTERPRETERS OF THE NAVAJO NATION WERE TEMPORARILY STATIONED, I grant to them the aforesaid land in the name of the King, our sovereign, with the expressed condition that it is to be settled by at least twenty citizens; that the lands are to be distributed in equal parts, and that they are not allowed or authorized, for them-

selves or their heirs, to sell or dispose of the lands granted to them. It being his Majesty's will, according to his last orders, that the lands should descend from father to son or his heirs in a direct line; and if any colonist, to suit his own conscience, should desire to remove, under any pretext whatever, his possession or share shall remain for the benefit of the one taking his place, in which case the residents of the same place, or persons marrying there, shall be preferred, and for which no remuneration whatever shall be exacted by the person voluntarily absenting himself or expelled or banished by the authorities on account of his bad conduct; that besides the subdivision above mentioned, a sufficient amount of land is to be left for pastures and watering places as well as to allow for the increase of the settlement, if such may be the case (which is likely to occur)—(torn)—order of the chief justice of that jurisdiction, Don Antonio Armenta, to place the parties in possession under the rules prescribed by law.

In obedience to this decree, Don Antonio Armenta, the same *alcalde* who delivered to the Garcias the possession of the grant of 1788, on March 14, 1798, being at the place and having summoned the natives of the *pueblo* of Jemez, to whom he measured the league belonging to them, found a surplus of two thousand one hundred *varas*, which they had before arriving at the Cañon de San Diego, all of which they claimed as their own, and to which he asserted they had no right, and finding no other impediment, he proceeded to the surplus lands, and finding no one with a better right, and all parties being present and informed with regard to the matter, he took them by the hand and led them over the land in proof

of legal possession, which they received quietly and without opposition; and he proceeded to deliver to each of the said settlers three hundred *varas*, with which they were satisfied, leaving the remainder for the benefit of all, and without any of the land being left for any person to enter; and in order to prevent any other from coming to meddle and create difficulties between the citizens and Indians, he gave them to understand that their boundaries were: On the north the Vallecito de la Cueva, on the south the termination of the Indian league, on the east the boundary of Vallecito, and on the west the opening toward the middle *arroyo* and the Rito de la Jara. (R., 38–39.)

It will be noted that in this act of possession not one single word is said or any mention made of the existence of the grant of 1788, or any claim thereunder by the said Garcias or anyone else, save the Indians, whose claim was ignored, and no reservation seems to have been made of the rights of anyone.

There now appears in the record an independent paper, which purports to have been executed by Armenta on the same day, which is substantially that at the Cañon de San Diego de Jemez, on the 14th of March, 1798, before Armenta, there being assembled all the persons who took possession of said Cañon de San Diego with Francisco Garcia de Noriega and Antonio Garcia de Noriega, two brothers of the first possessors, the said Garcias declared in a loud and clear voice, which all heard, because they shouted with distinctness, and they all unanimously

agreed to abide by what was said by the said Garcias, and their reasons were these:

> Friends and brothers, now each of you is about to take the lands which his Majesty has granted and donated to you; but you are all notified that the lands, which we first and in our first grant, we have been possessing, be all of you aware that I and my brother are going to enjoy the same freely, without any of those present, nor their children nor anybody else, shall desire to interpose obstacles, and because as first possessors we have the right to enjoy said lands and to cultivate them with full title, as well ourselves, our children and our successors; and so that none of those who are present may plead ignorance we have so spoken to-day, there being none absent. The said Garcias having made all the remarks, all unanimously replied that they asked reasonable justice, and that neither by themselves, their children, nor successors, would there be interposed any suit or demand against them at any time, and if they perchance should wish to do so they would take the case until leaving them in peace concerning the said land which they had been so justly possessing. (R., 39–40.)

It also appears that on December 1, 1808, in a report to the governor by Ignacio Sanchez Vergara, that the interpreter of the Navajos, Antonio Garcia, presented to him a document executed by the former *alcalde*, Antonio de Armenta, under the decree of governor Concha, as appears from the grant itself, and the whole of the Jemez Cañon having been settled under an order of governor Chacon and the royal grant made to them, which embraced the lands granted to the Garcias, difficulties and

contentions resulted between them; that he deemed the title of the Garcias better, because they had been prior settlers for a period of ten years, which fact, he says, was made known to the new settlers at the time of their grant and assented to by them; and he requests the governor to determine whether the Garcias had right to the land they claimed and asked him to approve the same, so as to obviate all questions in the future and to determine whether or not the land claimed by the Garcias was included in the latter grant to the settlers, and if not, that a copy of the original, which he inclosed, might be taken, the latter to remain in the archives of the government. (R., 40-41.)

A rough draft, unsigned, of a reply to the *alcalde*, was found in the archives, dated Santa Fé, December 13, 1808, and is what is called a *borrador*. By this communication it appears that the governor declined to decide the question submitted to him by the *alcalde*, but gives it as his individual opinion that the Garcias had the better right, and if the new settlers did not coincide with this view he was to permit them to have recourse to the royal *audiencia* at Guadalajara, as the documents referred to were sanctioned by former governors of the province and the royal *audiencia* alone could annul them, and he returned the documents to be delivered to the parties. (R., 41.)

Plaintiffs introduced in evidence the deposition of SANTIAGO GARCIA Y MONTOYA, taken before the surveyor-general in 1880, who states his age to be fifty-three years, and resides at Guadalupe, on the Puereo river; has known the Cañon de San Diego tract all of his life,

being born there, and twenty years afterwards moved away; the tract belonged to the heirs of Francisco Garcia de Noriega and Antonio Garcia de Noriega; he knew the boundaries as they were understood by the people in the neighborhood. Various persons lived upon the tract from time to time and cultivated portions of it by permission of the owners; that at this time some persons are living on it without their permission, as squatters. When he first knew the tract, one of the grantees, Antonio Garcia de Noriega, lived there with his family, dying there about the year '35; he was at that time about seventy years of age, and upon his death his family moved near the junction of the rivers. When he was born, Francisco Noriega, also one of the original grantees, lived with his family upon the tract, and some of them live there yet. Knows of no adverse claim by anyone. Knows of the tract of land adjoining it, but never heard that they claimed any interest or title to this tract. Has seen the original title papers for this tract and identifies them as Exhibits "A" and "B." He saw them in the year 1840 in the hands of Nerio Montoya, a grandson of Antonio Garcia de Noriega, and that the papers originally in the hands of Francisco Garcia on his death passed to Antonio, and upon the death of the latter into the hands of Nerio, his grandson. The papers, he understood, always remained in the family. He was interested in the land with the grandson of Francisco Noriega. (R., 23–25.)

Nerio Antonio Montoya, examined before the surveyor-general on behalf of the claimant, states he was

seventy-three years of age, resides at Nacimiento, Bernalillo county. Knew the tract called the Cañon de San Diego, which is situated north of the Indian *pueblo* of Jemez on the San Diego river, both sides of which constitute the boundaries. Has been acquainted with the tract since 1822, when he went to live upon it; remained there until October, 1879; the tract was reputed to belong to the heirs of the original grantees, of whom he was one. Knew Antonio Garcia, who was his grandfather and lived at the mouth of the junction of the two rivers. Knows of no conflicting claim to the grant, and the Indians of Jemez have never made any claim to it. States that the heirs and grantees of the other grant of the same name never made any claim to this land; that they were two distinct and separate grants, and have always been so regarded and treated by those claiming under them, respectively. The grant sued for is the small one, the senior and within the latter, but unaffected by it. The original grant papers he knows, and they have been in his possession and keeping since the death of his grandfather, and on his death they passed into the possession of Montoya's mother, who died in the year 1852, residing on the grant at the time of her death, where she had lived since 1822. They remained in his possession since her death, until June last, 1879, when they were delivered to his cousin, captain Augustin del Valle, to be filed with the surveyor-general for approval and confirmation by the government. He recognizes the papers and identifies them as Exhibits "A" and "B." His interest in the grant is as the grandson of one of the origi-

nal grantees, José Garcia de Noriega, and he was about forty-eight years old when his grandfather died. His father's name was Manuel Montoya. Had seen the papers in the possession of his grandfather and had occasion to read them for him; did not remember Francisco Noriega, the other grantee, who was killed when he was very young. (R., 25–27.)

AUGUSTIN DEL VALLE, one of the plaintiffs, examined before the surveyor-general on behalf of the claimants in 1880, states his age to be forty-eight years and his residence at the town of Bernalillo. Papers were handed to the witness, and he states they are the same papers he handed to Mr. Chavez, his attorney, and they came into his possession at the end of June or July last, 1879, at the house of Nerio Montoya at Nacimiento, who delivered them to him to be filed with the surveyor-general. (R., 27–28.)

On the trial of the case, AMANDA BOARDMAN, chief clerk of the surveyor-general's office, testified on behalf of the plaintiffs and produced certain papers from that office, to wit: Papers in the case reported, No. 25, Town of the Cañon de San Diego grant, and No. 22, Cañon de San Diego tract. The paper identified as archive 379 is composed of the letter of the *alcalde* to governor Manrique and his reply thereto (R., 40–41), dated respectively December 1 and December 13, 1808. (R., 47–48.)

AMADO CHAVEZ, one of the plaintiffs in the case, testified that he was forty-three years of age, residence Santa Fé, superintendent of public instruction of the territory, and the great-grandson of Francisco Garcia de Noriega;

that Augustin del Valle, one of the claimants, was grandson of Antonio de Noriega; that Ramon Baca was a grandson of Francisco Garcia de Noriega. That Francisco and Antonio Garcia de Noriega were two Spanish brothers who were interpreters for the Navajos, and lived in the Cañon de San Diego, and were the owners of the tract of land known by that name. Francisco Garcia was captain of the militia under the Spanish government, and was killed by the Navajos. He knows nothing about the possession of the *cañon* by the descendants of the two Garcias, except as a matter of family history. That Augustin del Valle, grandson of Antonio, is the owner of the house of his grandfather and the land that belonged to him, and he is in possession of the same; he thinks Augustin del Valle lives at Jicarilla, in Lincoln county, and does not know who is in possession of the land at the present time; knows where the Jemez river is, and knows where Guadalupe creek joins it, and the land possessed by Augustin del Valle is up from the junction of the rivers, but he can not tell how far. Has known the Cañon de San Diego all of his life. First saw the papers in the case about twelve years ago, at the time they were presented to the surveyor-general; had heard of them all of his life but had not seen them; the first time he ever saw them they were handed to him by Augustin del Valle, who told him he had obtained them from his grandfather. Knew about the g ant to the Town of the Cañon de San Diego, and that it was recommended for confirmation, but did not remember the date.

Here counsel offers in evidence Exhibits "A" and "B," the original grant of 1788, to which the government

interposed objection, because the same was not shown to be an archive or that it was properly recorded, or that the record had been lost or destroyed, and the government especially objected to the translation of the granting decree thereof; also the reservation made by the *alcalde* in 1798 of the land alleged to have been granted in 1788, to the introduction of which counsel for the government objected upon the ground that the same was signed by the *alcalde* without any attending witnesses; that no notice was given that it had been accepted and any reservation made; that the same was produced from private hands and filed by private parties and was not one of the archives; that it was not in due form; that he had no authority to make any reservation from the orders and decrees of the governor, and, if he did so, he exceeded his authority, and it was not subsequently ratified by being returned to and approved by the governor.

Next was offered in evidence the correspondence between Ignacio Sanches Vergara and the governor, dated, respectively, December 1 and 13, 1808. Objection was made to the reply of the governor, because it was an unsigned paper, and does not purport to have been executed by anyone for and on behalf of the governor, and does not purport to be the act of the governor, acting for and on behalf of the government, but merely a private opinion.

On cross-examination, Amado Chaves testified that he had examined the papers, but does not know where the boundaries of the land are. The north boundary was pointed out to him, and it is above the Hot Springs some distance, but he does not know how far—possibly two

miles. The south boundary, as the junction of the two rivers, was pointed out to him, but he does not know it of his own knowledge. When he was down there, the grant had not been surveyed; he was on his way to Jemez Hot Springs. He does not remember whether he knew of the existence of the grant then or not. He obtained his information from Augustin del Valle. His great-grandmother on his father's side was born on the grant of the Cañon de San Diego. He does not know of any settlement between the Indian *pueblo* of Jemez and the Hot Springs, except at the junction of the Jemez and Guadalupe rivers. His grandmother spent most of her life at Cevilleta, about fifty miles away from the grant.

Upon reexamination he states he was informed Francisco Garcia de Noriega was killed in 1807.

On recross-examination he states he was present in the surveyor-general's office when testimony was taken in 1880, and was prosecuting the claim. He believes that Mr. Miller, the chief clerk, wrote out the testimony of Santiago Garcia y Montoya. The location of the ranch of Antonio Garcia de Noriega was pointed out to him by Augustin del Valle. He does not remember whether the same was above or below the junction of the rivers; does not know the south boundary of this ranch now. The muniments of title were brought to him by Augustin del Valle, and he is at present living in Lincoln county. When he first knew him, he lived at Bernalillo, near Albuquerque, and he told him he had got the papers from his grandfather. He had heard them spoken of in the family, but never had seen them. (R., 48–54.)

WILL. M. TIPTON, special agent of the government, testified on behalf of the defendants. He identified the document constituting the grant of 1798, or the town of the Cañon de San Diego grant as archive 375, consisting of the original *expediente* and *testimonio* thereof, bearing the indorsement of governor Chacon, who had ordered the grant made. At this point the government offered in evidence the petition presented to the surveyor-general for confirmation of this grant, and his report thereon upon which confirmation was had by the act of congress of 1860, Vol. 12, Statutes at Large, section 3, page 71. Mr. Tipton also identified the approval of the plat of said grant under the act of confirmation. (R., 54–56.)

JESUS TRUJILLO testified on behalf of the defendants that he was seventy-eight years old, resided at the Cañon de San Diego, and had lived there all of his life; knew the Indian *pueblo* of Jemez, and lived about a league and a half from the *pueblo* proper, south of the *cañon* and at the junction of the rivers San Diego and Our Lady of Guadalupe. He knows where the north line of the Indian *pueblo* lands is, being about four hundred yards from the *cañon*. Antonio Garcia de Noriega formerly owned the property upon which he now lives; that he bought the property from Nerio Montoya, a grandson of Garcia; that he occupies nine hundred *varas* from north to south, formerly belonging to José Garcia; all of his lands are at the edge of the *pueblo* league beginning right at the boundary of the league. He saw people occupying land at the junction of the rivers as far back as he could remember—in 1837. Knew José Antonio Garcia de

Noriega; he lived in the house now occupied by the witness; had heard of his brother, Francisco de Noriega, but did not know him; did not know the lands that had been allotted to him in the vicinity. Knows where the Jemez Hot Springs are, being about nine miles north from the junction of the river; the first person he remembers living at the Springs was Lorenzo Gonzales in 1837; at that time the *cañon* was depopulated by the hostility of the Indians; he went back in 1843. The various ranches were all in the *cañon*, divided into portions of three hundred *varas*. He first heard of the little grant in 1850, when the surveyor of the United States came there.

Both of the grants were brought and delivered to him together, and he told the surveyor the number of lots under the decree of Armenta and that of Chacon. They got a survey of the second grant. The papers of the first grant came from the house of the late Nerio Montoya; that was the first time the witness had seen them. He knew José Antonio Garcia. Prior to 1850 he never heard of the Noriegas (Garcias) laying any claim under the little grant. He claims his lands under the second grant and has always done so. Knew José Francisco Archuleta in his lifetime. He lived at the Cañon de San Diego at the place called El Rillito, about two thousand *varas* above the *cañon*. After that he lived at the Springs about nine miles above the junction of the rivers. He was eighty years old when he died; his lands were located at Rillito, about eight miles from the Springs and about two thousand *varas* north of the junction in the Cañon de San Diego. There are two *cañons*, the

Cañon de San Diego and the Cañon de Guadalupe. The Cañon de Guadalupe is in the large grant, and the Cañon de San Diego is in both the large and small. They come together at the junction of the rivers and branch off to the north to the right and left, Guadalupe to the right and San Diego to the left. Lands were allotted in both *cañons*. José Francisco Archuleta had land at the Springs in the year 1840. The Springs are not in the grant, they are above it. The people constructed their houses at the end of the meadows near the Springs in the year 1843; Archuleta lived there before. The Springs were abandoned when the Texans came in; he does not remember the date. All of the people were driven away from their possessions in the Cañon de San Diego. Knew the lands which Mr. Miller bought from Archuleta; they are situated at a place called Del Pueblo, about six hundred yards north of the Springs. On cross-examination he testified that he did not know the little grant very well; he thinks that the Cañon de Guadalupe is not on the small grant; states that the people settled there at Guadalupe when it was partitioned them by Chacon and Armenta. (R., 56–63.)

Emiterio Archuleta testified on behalf of the defendants, that he lives at the Hot Springs, Bernalillo county, and his father's name was José Francisco Archuleta, who died about three years before. His grandfather's name was Blas Archuleta; the wife of Blas Archuleta was named Josefa Jaramillo, who was a daughter of José Jaramillo, one of the original grantees in the second grant. Witness is forty-six years old and born

in the Cañon de San Diego, about a mile and a half north of the junction of the rivers. His father had land there which formerly belonged to José Jaramillo, his grandfather, one of the original grantees. Witness lived there twenty-two or twenty-three years; his grandfather had three hundred *varas* there which still belonged to the family; he lived there till 1865 when he went up to the Springs; four or five persons went up with him; the first person, to his knowledge, who lived at the Springs was his father. Witness does not know how many people were living at the junction of the river at the time he was born. There were a good many living up the *cañon* near the place where he was born. Pablo Gallegos had planted land between his father's and the junction of the rivers. After going to the Springs his father settled and cultivated land there. Part of that land belongs to the family of his father and another part of it was conveyed away. His mother's name was Viviana Montoya. He knows that some relatives of his mother were grantees of the grant to the Montoyas, and his grandmother's name on his mother's side was Marta. The name of his grandmother's husband was Juan Antonio Montoya, whose father's name he does not know. On cross-examination he testifies that he remembers from the time he was eight or ten years old, he was living then with his father, in the Cañon de San Diego, as before stated. Counsel asked witness if he did not say that his father had lands allotted to him in the Cañon de Guadalupe, to which witness replied he did not, that he and others had lived there, having some strips of land in the Cañon de

Guadalupe, but that the land in that *cañon* was not allotted to him. (R., 56–67.)

FRANCISCO PEREA testified on behalf of the defendants that he was sixty-one years old, born at Padillas, thirty miles below Albuquerque, and lives at the Jemez Hot Springs and knows the land in question claimed under the grant of 1788. Knows where the Town of the Cañon de San Diego is; has lived most of his life in Bernalillo, about forty miles from Jemez. First went to the Hot Springs in 1853, and nobody was living there at the time. Knows the boundaries of the little grant, and at the time he went there there was no person living on it. There were persons living at the town of the *cañon* below. The town of the *cañon* is situate about a mile above the junction of the rivers in the Cañon de Guadalupe. Nobody was living near the Cañon of the Jemez. Since 1853 he has been through the *cañon* nearly every year. Learned of persons living there in 1864 and 1865. Francisco Archuleta Sandoval and José Francisco Boros live there a little above Domingo Salas. He first heard of the little grant in 1865, until when he only knew of the large grant. He had the records searched when he heard of the little grant and found there was no such grant. He looked everywhere in search of it and was assisted by the agent of the United States; looked at the records in the office of surveyor-general Atkinson; Miller was clerk; they got out all of the cases. The reason he became interested was because he was going to the Hot Springs. When he first heard of the Jemez Hot Springs the condition of the *cañon*

was wild, and there were some ruins of houses above which were occupied, especially the property which he inherited from his mother. His people got their land from a man by the name of Aguilar and Lopez, in the big grant, located about two miles from the Springs. (R., 67–69.)

JUAN MARTIN testified, on behalf of the defendants, that he lives at the Cañon de San Diego and is fifty-seven years old; his father's name was Matias Martin, and his grandfather's name was Juan Domingo Martin. He lives on the land which came to him through his father; his grandfather lived on the same piece of land. It is situated two miles above the junction of the rivers, and the *cañon* is sometimes called the Cañon of our Lady of Guadalupe, but it is the same *cañon* as San Diego. Witness first heard of the papers in this case in 1861, and he describes the discovery of the papers in this case as follows:

> In the year '61 this man that I saw was married to a sister of mine, Nerio Montoya. Then he was going over his papers, and he showed me this paper and said to me: "This paper had been given to my grandparents;" and then he said to me, "This paper is not worth anything to us, his heirs, because this paper was first given to our grandparents and my uncle, José Antonio Garcia de Noriega and Francisco Garcia, and they having transpired there came some grandchildren, Don Francisco Garcia de Noriega, Augustin del Valle, and Agapito Garcia." When they came to the house of this Don Nerio Montoya, they brought with them Father Valencia, and then Nerio Montoya went and brought the papers and placed them on the table; while they were

looking over the papers, Father Valencia found this paper which Don Nerio had said to me had belonged to our grandparents, and then Father Valencia took this paper and then went outside, and as I was an errand boy I went out in the yard also, and Father Valencia said to Augustin del Valle, "Man, take this paper; it will be worth something to you some time." I do not know anything else about that matter. (R., 70.)

Witness states no one had made any claim under these papers prior to that time. (R., 69–71.)

J. W. MILLER testified, on behalf of the defendants, that he resides at the *pueblo* of Jemez and is acquainted with the Cañon de San Diego; knows Juan Martin, who has just testified, who lives about a mile south of the Jemez Hot Springs, and cultivates land about a mile south of where he lives; it is five miles from the *pueblo* of Jemez to the junction of the rivers. On cross-examination, witness says Martin has been living in the Cañon de San Diego to his knowledge for nineteen years. Does not know whether he lived in the Cañon de Guadalupe or not. (R., 71.)

ANTONIO JOSÉ GARCIA testified, on behalf of the defendants, that he lives at the Cañon de San Diego, and was born in the year '25. His wife and himself are descendants of Francisco Garcia de Noriega and Antonio Garcia de Noriega. Lives near the Hot Springs; was born at Albuquerque, and went to the Cañon de San Diego in 1863. At that time no one was living at the springs except Francisco Cordova. Owns land above the junction of the rivers at Hot Springs, where he lives.

Obtained the land from various individuals. Witness claims his land by purchase and not as an heir of the Noriegas. (R., 71–72.)

J. W. MILLER, recalled, stated that he claims to own lands in the grant by deed from Archuleta, Juan Francisco Archuleta, and Polito Mestas. The land obtained from Mestas was deeded to him by Antonio Atencio, who claims, he believes, as an heir. (R., 73.)

JESUS TRUJILLO, recalled, testified, on behalf of the defendants, that there were seventy persons living at the Cañon de San Diego, north and south of the junction of the rivers, and he names a number of persons who lived in the *cañon* above the forks of the river. This was about the year 1820, and they lived there until the year 1837, when he saw them at Jemez, having left the *cañon* on account of war with the Indians, and returning in the year 1843. When they returned, they made a small town in the Cañon de San Diego and Guadalupe. There are only a few inhabitants there now, altogether not exceeding twenty or thirty families. On cross-examination, witness states he was born in the "year fifteen." (R., 73–74.)

B. S. RODEY testified, on behalf of the defendants, that he lives at Albuquerque and is an attorney at law there; is one of the defendants in the case and filed an answer. His interest in the grant of 1798 is by purchase of a third interest of Francisco Archuleta; also purchased some strips of land near the Springs, the deeds being dated in 1887. Witness states that he purchased the land and received the deeds without any knowledge

of the existence of the smaller grant. On cross-examination, he states that he gave $100 and $2,500 worth of services for the land. The lands he purchased are within the smaller grant, and he never heard of its existence till three months ago. (R., 75.)

JESUS TRUJILLO, recalled, testified that he knew Juan Atencio, who was his brother-in-law. His father was José Atencio. Tomas Atencio owned the land where Mr. Miller lives, and Mr. Miller is occupying and cultivating the land that formerly belonged to José Atencio. Knew Nerio Montoya, whose father was Tomas Montoya. (R., 76.)

This is all the testimony in the case.

BRIEF AND ARGUMENT.

The real interest which the government has in securing a rejection of the grant claimed in this case (Cañon de San Diego) is that because all of the land included within the outboundaries of this grant (1788) was confirmed and patented by the United States to the heirs and legal representatives of the original grantees of a grant made in 1798 (Town of Cañon de San Diego), two of whom were Francisco Garcia (de Noriega) and José Antonio Garcia (de Noriega) grantees of this (1788) if the court should hold that the earlier grant (1788) made to these Garcias, who were then interpreters for the Navajo nation, vested in them a complete and perfect title prior to the making of the later grant, the government might become liable for a sum not exceeding $1.25 per acre for the land included within the outboundaries

of the older and smaller grant (1788). (See Act of March 3, 1891, section 14, creating the Court of Private Land Claims, Reynolds' Spanish and Mexican Land Laws, p. 15.)

A majority of the judges of the court below rejected this grant, in an opinion written by Mr. Justice Sluss, which very clearly sets forth the contentions of the government and the grounds upon which the court rejected the claim (R., 28–33), which were that the Navajo interpreters, Francisco and José Antonio Garcia and those claiming under them were estopped from asserting title adversely to the patented grant of 1798, for the reason that they were the principal petitioners for the larger and subsequent grant of 1798, and that no reservation was made of any rights they had under the earlier and smaller grant of 1788, except the reservation of the lands which they were actually cultivating at the time.

A minority of the court, Mr. Justice Stone and Mr. Justice Murray, filed dissenting opinions, holding that all of the rights and all of the land included within the outboundaries of the grant of 1788 were specifically reserved and retained by the Navajo interpreters, Antonio and Francisco Garcia, and that in 1808, upon a report by the *alcalde*, the governor of the province adjudicated the grant in favor of the Garcias.

Considering all the documents relating to or in any way bearing upon both of these grants, I think it will be clearly demonstrated that the position of the majority of the court below is unassailable.

The government does not agree with the translation of the title papers of the earlier and smaller grant of 1788

(Cañon de San Diego) which has been used by the appellants. Under ordinary circumstances the difference between their translation and that of the government might be deemed immaterial, yet when we come to construe the recitals in the title papers of each of the grants the importance of a correct translation is at once apparent. The translation of appellants of the grant of January 27, 1788, by governor Concha (R., 14), is "I grant in the name of the King, *for* cultivation and work, the land," etc., the original text of which is "*Concedo en nombre del Rey, el cultivo y labor de la tierra,*" and this the government translates, and correctly so, "I grant in the name of the King *the cultivation and working* of the land," etc. When this is taken in connection with the recitals in the decree of the governor making the grant of 1798, wherein he states, "In view of the foregoing petition made by José Miguel Garcia and other citizens mentioned therein, in regard to settling in the *cañon* known as the San Diego de Jemez, *where the interpreters of the Navajo nation were temporarily stationed*," etc., it will be seen that governor Chacon did not understand that the Garcias (de Noriegas) were occupying the *cañon* or they had any absolute title to it, and he made the grant in 1798 with that condition in view.

Referring specifically to the grant of 1798, for one hundred and sixteen thousand acres, which has been confirmed and patented, it will be seen by the petition for the grant (R., 37) that Francisco and Antonio Garcia, brothers and interpreters of the Navajo nation, in unison with eighteen others named in the petition, applied for a grant of land, stating "a quantity of vacant and uncul-

tivated land lies in the Cañon of San Diego, adjoining the boundaries of the land belonging to the Indians of the town of Jemez," and that a settlement thereof would be beneficial to the province and advantageous to their families and descendants by settling upon these lands with their property and cultivating the same. The boundaries of the land desired are set forth in the petition, and it is admitted that they entirely include the grant of 1788. Not one word is stated in this petition that any claim was asserted to or right sought to be exercised over the land so included, under the previous grant of 1788.

The point at which this settlement was to be made, and where there was "a quantity of vacant and uncultivated land," was the very place named in the grant of 1788, the Cañon de San Diego. Upon this petition governor Chacon made the grant, wherein he recites, as above referred to, that the interpreters for the Navajo nation "were temporarily stationed" there; also requiring that the same should be settled by at least twenty citizens, that the land should be distributed in equal parts, and that they were not permitted to dispose of the land granted them, etc.; that besides the land subdivided among them, there should be left sufficient for pasturing and watering places, as well as to allow for the increase of the settlement, and he directs that Don Antonio Armenta place the parties in possession under the rules prescribed by law.

Up to this point the proceedings were regularly participated in by the Garcias, the Navajo interpreters mentioned by governor Chacon, and nothing appears in

these proceedings showing that there ever had been a grant in 1788 to the Garcias alone, or to show that the very spot, now claimed to have been reserved by them, was ever occupied or cultivated under any grant.

Antonio Armenta, the *alcalde* who was ordered to deliver the possession to the claimants, executed what is commonly called and known as the act of juridical possession, wherein he states that in the Cañon de San Diego de los Jemez, having summoned the natives of the *pueblo* of Jemez, to whom was measured the league belonging to them, he found a surplus of two thousand one hundred *varas*, which they (the Indians) had, before arriving at the Cañon de San Diego and were claiming as their own, but to which, the *alcalde* states, they had no right in any manner; and believing that it was the wish of the sovereign that his lands be settled by his citizens wherever a surplus was found, finding no impediment, and using the authority in him vested, and finding no one with a better title, and the Garcias (the Navajo interpreters) and the eighteen others named in the petition being present and *well informed* in the matter, he took them over the land, performing the usual formal acts in proof of legal possession, and they received the land quietly and peaceably. After concluding these formal ceremonies he states, "I delivered to each one of said citizens three hundred *varas*, with which they were well satisfied, leaving the remainder for the benefit of all, and without any other lands left for any person to enter," and he proceeds to define the boundaries (which include the lands claimed under the grant of 1788) as they appear in the act of

juridical possession. (R., 38–39.) By this act of possession there were allotted six thousand *varas* to twenty persons, two of whom were the Garcias (Navajo interpreters), the grantees of the alleged grant of 1788.

Claimants produce an independent document, signed by Armenta and dated upon the same day, purporting to have been executed at the same place and in the presence of the same parties as the act of juridical possession. (R., 39–40.) It is this document which forms the basis for the contentions of appellants, which were largely followed by a minority of the court below in their dissenting opinion. I have serious doubts as to the *bona fides* of the parties in the execution of this document by Antonio Armenta upon the date and at the place it purports to have been made, to wit, in the Cañon de San Diego de los Jemez, March 14, 1798; my reason for doubting its authenticity is that no mention was made in the act of juridical possession of its execution, nor of any fact contained therein, a most extraordinary and unusual omission if there was any intention by the parties to make any reservation whatever. Any reservation contemplated should have been placed in the title papers themselves, in order that the governor might be apprised of that fact. Certainly there is nothing in the petition or grant to inform him of any adverse claim that existed or would be made in favor of the Garcias (Navajo interpreters).

I also doubt its *bona fides*, because Antonio Armenta did not execute this instrument in the same manner he executed the other documents and the act of possession,

at the alleged identical time and place, in this that it was executed without any witnesses; and being at the same time and place why was it not executed with the assistance of Salvador Lopez and José Miguel Garcia, those that witnessed the execution of the act of juridical possession? I do not believe that Armenta executed this document at the time and place alleged; if so, why was it not legalized, with the usual witnesses, as should be done in all documents executed by the officers of the province, or before a royal notary? This instrument was not attached to nor made a part of the *expediente* of this grant, and it was evidently intended to be an unattested private paper and retained by the Garcias until the opportunity was ripe for its presentation.

It is attempted to give this paper the same force and effect as the act of juridical possession, and it can not be conceived why the recitals contained in it were not included in the act of possession, if the proceedings they describe took place at that time.

But, let us assume that the instrument was properly executed at the time and place it purports to have been. It is evident that the construction placed upon it by a majority of the court below was the correct and only reasonable one, that the reservation only included the lands which the Garcias had been cultivating prior to 1798 and not the entire grant of the Cañon de San Diego of 1788.

Six thousand *varas* were allotted north of the north line of the Indian *pueblo*. The *alcalde* found two thousand one hundred *varas* of vacant land between that line

and the Cañon de San Diego, so that, without considering these two thousand one hundred *varas*, there were left three thousand nine hundred *varas* that must have been allotted in the Cañon de San Diego, and within the tract now claimed under the earlier grant of 1788. It can hardly be contended that the *alcalde*, the Garcias, and the other allottees would have proceeded with the allotment of three thousand three hundred *varas* (the six hundred *varas* allotted to the Garcias being deducted) and at the same time have notified the eighteen remaining allottees that they had no right or title to the lands assigned them. Such a contention is absurd; but if we receive this unattested instrument with the same consideration as the act of possession, such an understanding is forced upon us. Thus, the acts of the parties themselves, as well as of the officials acting for the government, necessarily leads to a construction of this instrument in harmony with the views taken by a majority of the court below.

It has also been contended that these lands were not allotted in the Cañon de San Diego, but in the Cañon de Guadalupe. This contention is effectually controverted, however, by the recitals of the instrument executed in favor of the Garcias, which has just been under consideration, and also by the subsequent proceedings taken by the *alcalde* Vergara in 1808, to which we desire now to call the attention of the court.

It appears (R., 40–41) that in 1808 a controversy arose between the Garcias and some of the grantees who were occupying this *cañon* under the grant of 1798. On

December 1, 1808, the *alcalde* made a report to governor Manrique, wherein he states that the Navajo interpreter (Antonio Garcia de Noriega) presented to him a document executed in his favor by the former *alcalde* of the jurisdiction, Antonio de Armenta, under the decree of Don Fernando de la Chacon, as appears from the grant itself, and the whole of the Jemez Cañon having been settled under the order of Don Fernando Chacon, under a royal grant which embraced the lands granted to the Garcias, and by reason thereof contentions resulted because the Garcias asserted title to all the land in the *cañon*, and that he deemed the title claimed by Antonio Garcia to be founded in law, he having been the prior settler for a period of ten years; that at the time the new settlers were given possession they gave their consent, as the Garcias made it appear by a document which the *alcalde* executed to the two brothers that their lands were to be reserved, which he inclosed to the governor, and asked that he decide the question so as to avoid all further difficulties.

On December 13, 1808, the governor replied to this communication (R., 41), stating that the matter did not require his decision, inasmuch as the grant of the Garcias made their rights appear clear, which, being the older, always has the preference, and that the later settlers could not deny to the Garcias a better title, and so the Garcias should remain on the same grant which they had held prior thereto, and if the new settlers did not coincide in the matter, he should not permit them any recourse; he also stated that the documents referred to

were sanctioned by former governors, and that the royal *audiencia* alone could annul them. He returned the documents to the *alcalde* with instructions to deliver them to the parties interested.

It is contended by appellants that this proceeding was judicial and bound the parties thereto. Such a construction is giving to this letter a greater dignity than the governor expressly states it should have. It was only the individual opinion of that gentleman, and bound neither the government nor the parties thereto. It is unsigned. I think the minority of the court below, in their dissenting opinions, have given to this letter more scope than it deserved. It is not probable that the validity of the allotments made by Armenta of the lands settled under the grant of 1798 within the Cañon de San Diego de Jemez was at all questioned, but construing these proceedings of 1808 in connection with all of the papers relating to the grant of 1798 and the acts of the parties at the time, I am led to the conclusion that the communication of the *alcalde* in 1808 relates to the six hundred *varas* that had been formerly possessed and cultivated by the Garcias under the grant of 1788, and to which they were given a preferred right in the allotments made by Armenta at the time of delivering juridical possession.

If this conclusion is not correct, I am convinced that the unattested instrument given to the Garcias by Armenta, and purporting to have been executed at the same time and place as the act of possession of 1798, March 14th of that year, was actually executed by Armenta

after he went out of office, when he could not obtain the witnesses who attested the act of juridical possession, and just prior to the initiation of the proceedings by Vergara in 1808. At least, from the manner and form of the independent paper, the *bona fides* of Armenta, Vergara, and the Garcias is open to serious question, for it must be admitted that Armenta, with the assent and in the presence of the two Garcias, allotted to the settlers under the grant of 1798 at least three thousand three hundred *varas* of land lying in the Cañon de San Diego de Jemez, and which they had been possessing under said grant and allotment up to the date of the proceedings initiated by Vergara in 1808.

In discussing the unattested instrument of Armenta, dated March 14, 1798, at the Cañon de San Diego, and the proceedings initiated in 1808 by Vergara, a majority of the Court of Private Land Claims placed a very reasonable and extremely conservative construction upon them and their integrity. It seems to me, however, that a careful examination will stamp the *bona fides* of the proceedings as extremely doubtful, inconsistent with the recitals contained in the petition, the grant, and the act of juridical possession, and inconsistent with the construction placed upon the rights of the Garcias by Antonio Armenta and themselves at the time the allotments were made in the Cañon de San Diego to their cograntees of three thousand three hundred *varas*, and tested by every ordinary rule of construing instruments and the acts of parties under them, the unattested alleged reservation, dated in the Cañon de San Diego, March 14, 1798,

at the same time and place of the execution of the act of possession must result in its exclusion.

I respectfully submit that the judgment of the court below, rejecting the grant, should be affirmed.

Respectfully submitted.

MATTHEW G. REYNOLDS,
Special Assistant to the Attorney-General.

JOHN K. RICHARDS,
Solicitor-General.

certificate of 1798 and the correspondence of 1808 conduct to no other result; and that, in the light of all the evidence, the conclusion of the court below was correct.

This was a petition filed by heirs and legal representatives of Francisco Garcia de Noriega and José Antonio Garcia de Noriega, for the confirmation of an alleged grant made by Governor Concha, January 27, 1788, of 9752.57 acres, called the Cañon de San Diego, situated in the county of Bernallilo, New Mexico, and included within a grant of 116,288.89 acres by Governor Chacon, March 6, 1798, alleged in the petition to have been to the "town of the Cañon de San Diego."

The granting papers of 1788 were produced and placed in the archives of the Government by claimants in 1879. As translated by the Government, they read as follows:

"Señor Governor Don Fernando de la Concha:

"We, Francisco Garcia de Noriega, interpreter for the Navajos, and José Antonio Garcia de Noriega, with the most profound respect appear before your Excellency and state, Sir, that a *cañon* which is called San Diego being found vacant, having seen that cultivation may be had and some animals pastured therein, we prostrate ourselves at the royal feet of your Excellency's grandeur solely to ask and pray that you deign in the name of his Majesty to favor us by giving us the said *cañon* for the purposes mentioned, on account of finding ourselves lacking land for planting, and, we deserving that his Majesty should favor us, we ask as a grant the said *cañon;* on account of all which we ask and pray that your Excellency be well pleased to command that what we request be done, that by your so doing we shall receive great benefit and favor, etc.

"Francisco Garcia de Noriega. (Scroll.)
"Jose Antonio Garcia. (Scroll.)

"Santa Fe, *January* 27, 1788.

"I grant, in the name of the King, the cultivation and working of the land which the petitioners ask for, the chief *alcalde* of the Queres, Don Antonio Armenta, placing them in

possession thereof, provided that no prejudice results to the Indians and residents settled in that vicinity, and it having been so done, following this decree he shall place the said taking of possession without prejudice to a third party, in order to copy it in the government book, and to write it out on stamped paper when the same shall reach this province.

"CONCHA. (Scroll.)

"At this Cañon of San Diego on the sixth day of the month of February, of the year one thousand seven hundred and eighty-eight, I, Don Antonio de Armenta, chief *alcalde* and war captain of the jurisdiction of the Queres, by virtue of the authority that is conferred upon me by Señor Don Fernando de la Concha, Knight Commander of Mora in the Order of Santiago, lieutenant colonel of the royal armies, civil and military governor of this province of New Mexico, being at the said cañon, having cited the natives of the *pueblo* of Jemez, who are the adjoining owners to said land, and having designated to them that which was their own they were well suited on account of receiving no injury by the giving of said *cañon*, and also knowing that it is the will of our Sovereign that his lands be peopled by his vassals in whatever surplus there may be, and finding no obstacle whatever that could interfere with it, and exercising the authority that is conferred upon me, I went to said Cañon of San Diego, and no one appearing who had a better right, nor there being any prejudice to a third party who might make objection, and said Indians, Francisco Garcia de Noriega, interpreter for the Navajos, and his brother, José Antonio Garcia de Noriega, being present and understanding it all, I took them by the hand, I conducted them over said lands, they pulled up grass, threw stones to the four cardinal points, and we all said together three times, 'Long live the King, our Lord (whom may God preserve,)' as evidence of true possession, which they received quietly and peaceably without any opposition, their boundaries being the following: On the north side, the waterfall (*salto del agua*); on the south side, the junction of the rivers and also a point of a red table land (*una mesa colo-*

CHAVES *v.* UNITED STATES.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

No. 4. Argued October 12, 1897. — Decided November 15, 1897.

By the Spanish law in force at the time of the alleged grant of 1788, set up in this case, lots and lands were distributed to those who were intending to settle, and it was provided that, "when said settlers shall have lived and labored in said settlements during the space of four years, they are hereby empowered, from the expiration of said term, to sell the same, and freely to dispose of them, at their will, as their own property," but confirmation after the four years had elapsed was required in completion of the legal title; and it was further provided that it should "not be lawful to give or distribute lands in a settlement to such persons as already possess some in another settlement, unless they shall leave their former residence, and remove themselves to the new place to be settled, except where they shall have resided in the first settlement during the four years necessary to entitle them to fee-simple right, or unless they shall relinquish their title to the same for not having fulfilled their obligation." On the facts in this case it is *Held*, that the granting papers in this record, taken together, do not justify the presumption of settlement and working by the two Garcias on the tract contained in the grant of 1788, for the ten years prior to 1798, or for four years thereof, or any confirmation of the grant thereupon, but that the contrary is to be inferred from the testimony in respect of possession; that Armenta's

rada,) and lands of said Indians. With respect to the east and west there is nothing more than some very high table lands on both sides of the *cañon*, which (table lands) serve as boundaries. And, there resulting no prejudice whatever, they were satisfied with them (the boundaries); and in order that it may so appear I, said chief *alcalde*, Don Antonio de Armenta, signed it, together with my two attending witnesses, with whom I act for lack of a public or royal notary, of which there is none of any kind in all this government, to all of which I certify.

"The interlineation 'river' is valid.

"ANTONIO DE ARMENTA. (Scroll.)

"(Armenta's scroll.)

"Witness: SALVADOR ANTONIO SANDOVAL. (Scroll.)

"Witness: NICOLAS ORTIZ. (Scroll.)"

There are some differences between petitioners' translations and those of the Government, the principal being in the opening words of the alleged grant, which in Spanish were: "Concedo en nombre del Rey el cultivo y labor de la tierra que solicitan los Supplicantes," etc. These words are translated by petitioners: "I grant in the name of the King, for cultivation and working, the land that the petitioners solicit"; and by the Government: "I grant, in the name of the King, the cultivation and working of the land which the petitioners ask for."

The granting papers of the grant of 1798 were as follows:

"Seal Third. [Seal.] Two Rials.

"For the years one thousand seven hundred and ninety-eight and ninety-nine.

"*To the lieutenant colonel and governor of this province:*

"Francisco and Antonio Garcia, brothers, and interpreters of the Navajo nation, in unison with Miguel Garcia, Joaquin Montoya, Salvador Garcia, José Manuel Garcia, Juan José Gutierez, Juan de Aguilar, Blas Nepumuceno Garcia, Bartholomew Montoya, José Montoya, Tomas Montoya, Juan Domingo Martin, José Gonzales, Salvador Lopes, Antonio

Statement of the Case.

Abad Garcia, Miguel Gallego, Marcos Apodaca, José Miguel Duran and José Maria Jaramillo, appear before your Excellency in the most approved manner the law requires and may be necessary, and state that a quantity of vacant and uncultivated land lies in the Cañon of San Diego, adjoining the boundaries of the land belonging to the Indians of the town of Jemez; and whereas the settlement thereof would be beneficial to the provinces, and advantageous to our present families and descendants to be settling upon these lands with our property and cultivating the same, we pray your excellency to be pleased to grant this aid and settlement that we petition for to the persons herein mentioned; being pleased at the same time to order, in the name of his Majesty (whom may God preserve), that we may receive from the boundaries beyond the land granted to the Indians of the pueblo, our petition calling for from east to west to the middle arroyo called Los Torreones, and the line running from north to south to the Vallecelo de la Cueva which is in front of the waterfall, and in a transverse line from said middle arroyo to the Rito de la Jara. We also protest that we will not injure with our persons or stock, a few trees which the Indians claim as their own, although they are planted beyond the limits of the lands which belong to them. Therefore we humbly pray your Excellency to be pleased to order our request to be complied with, granting us the vacant land asked for; by doing which we will receive grace, and we swear, in due form, that our petition is not made through malice; and one signed, the others not knowing how.

"José Miguel Garcia.

"*Decree.*

"In view of the foregoing petition made by José Miguel Garcia and other citizens therein mentioned, in regard to settling in the cañon known as San Diego de Jemez, where the interpreters of the Navajo nation were temporarily stationed, I grant to them the aforesaid land in the name of the King, our sovereign, with the expressed condition that it is to be settled by at least twenty citizens; that the lands are to be

distributed in equal parts, and that they are not allowed or authorized, for themselves or their heirs, to sell or dispose of the lands granted to them. It being his Majesty's will, according to his last orders, that the lands should descend from father to son, or his heirs in a direct line; and if any colonist, to suit his own conscience, should desire to remove, under any pretext whatever, his possession or share shall remain for the benefit of the one taking his place, in which case the residents of the same place, or persons marrying there, shall be preferred, and for which no remuneration whatever shall be exacted by the person voluntarily absenting himself, or expelled or banished by the authorities on account of his bad conduct; that besides the subdivision above mentioned, a sufficient amount of land is to be left for pastures and watering places as well as to allow for the increase of the settlement, if such may be the case (which is likely to occur) — (torn) — order of the chief justice of that jurisdiction, Don Antonio Armenta, to place the parties in possession under the rules prescribed by law. CHACON.

"*Possession.*

"In the Cañon de San Diego de los Jemez, on the fourteenth day of the month of March, in the year one thousand seven hundred and ninety-eight, I, Don Antonio Armenta, chief justice of the Pueblo of Jemez, by virtue of the authority conferred upon me by my superior, Don Fernando Chacon, gentleman of the order of Santiago, lieutenant colonel of the royal armies, political and military governor of this province of New Mexico, being at the aforesaid place, and having summoned the natives of said Pueblo of Jemez, to whom having measured the league belonging to them, I found a surplus of two thousand one hundred varas, which they had before arriving at the Cañon de San Diego, all of which they claimed as their own, without having any right to them in any manner; and believing that it is the wish of our sovereign that his land be settled upon by his subjects wherever a surplus may be found, and finding no impediment whatever, and using the authority in me vested, I proceeded to the surplus lands, and finding no one with a better title, and Francisco Garcia, An-

tonio Garcia, Navajo interpreters, Miguel Garcia, Joaquin Montoya, Salvador Garcia, José Manuel Garcia, Juan José Gutierrez, Juan de Aguilar, Juan Blas Pumuceno Garcia, Bartolome Montes, Tomas Montoya, José Montoya, Juan Domingo Sangil, Salvador Lopez, José Gonzales, Antonio Abad Garcia, Miguel Gallegos, Marcos Apodaca, José Miguel Duran and José Jaramillo, being present, all interested and well informed in regard to the matter, I took them by the hand, walked them over said lands, they pulled up grass, threw stones towards the four winds, and we all cried at once, three times, Live the King our sovereign (whom may God preserve) in proof of legal possession, which they received quietly and peaceably without any opposition whatever, because, after concluding all these ceremonies, I delivered to each one of the said settlers three hundred varas, with which they were well satisfied, leaving the remainder for the benefit of all, and without any other lands being left for any person to enter; and in order to prevent any other from coming to meddle and create difficulties between the citizens, as well as the Indians, I gave time to understand which were their boundaries, which are: On the north, the Vallecito de la Cueva, on the south the termination of the Indian league. On the east, the boundary of Vallecito; and on the west, the opening towards the middle arroyo and the Rito de la Jara; and no injury resulting to any one they were all satisfied, and in order that it may so appear, I, the said chief justice, signed with my two attending witnesses in the absence of a public or royal notary, there being none within the limits of all this government, to which I certify.

"ANTONIO DE ARMENTA.

"Witnesses:

"SALVADOR LOPEZ.

"JOSÉ MIGUEL GARCIA."

In 1879, when the documents of 1788 were produced by claimants and filed in the archives, the following certificate was also brought forward by them and put on file:

"In the Cañon de San Diego de Jemez on the fourteenth day of the month of March, year 1798, before me, Antonio

de Armenta, and there being assembled all the citizens who took possession of the said cañon, together with Francisco Garcia de Noriega and Antonio Garcia de Noriega, two brothers of the first possessors, said Garcias declared in a loud and clear voice, which all heard, because they shouted it with much distinctness, and they all unanimously agreed to abide by what was said by the said Garcias, and their reasons were these. Friends and brothers, now each of you is about to take the lands, which His Majesty has granted and donated to you; but you are all notified that the lands, which we first and in our first grant, we have been possessing, be all of you aware that I, and my brother are going to enjoy the same freely, without any of those present, nor their children nor anybody else shall desire to interpose obstacles, and because as first possessors we have the right to enjoy said lands and to cultivate them with full title, as well ourselves, our children and our successors; and so that none of those who are present may plead ignorance we have so spoken to-day there being no one absent. The said Garcias having made all the remarks, all unanimously replied that they asked reasonable justice and that neither by themselves, their children, nor successors would there be interposed any suit or demand against them at any time, and if they perchance should wish to do so they would take the case until leaving them in peace concerning the said land which they had been so justly possessing.

"All here set forth I, said chief justice, witness, for all of the citizens declared that it was not to them any imposition that the Messrs. Garcias should enjoy the lands which they were heretofore cultivating, and that it may so appear whenever requisite I will make this document in favor of the said two Garcias, I sign the same with those of my attendance in the aforesaid cañon in said day, month and year, to which I certify.

"Anto. de Armenta."

It also appeared that there were among the old archives the following:

Statement of the Case.

"Governor: The interpreter of the Navajos, Antonio Garcia, has presented to me a document executed to him by the former alcalde of this jurisdiction, Antonio de Armenta, under the decree of Don Fernando de la Concha, as appears from the grant itself, and the whole of the Jemez Cañon, having been settled under an order of Don Fernando Chacon in a royal grant made to them and in which it embraced the lands granted to the Garcias, whence results contention between the one and the others the latter grantees alleging title to all the land; and I, deeming that the title claimed by Antonio Garcia is founded in law, he having been the prior settler for the period of ten years, with the condition that at the time they were given possession all the new settlers gave their consent, as said Garcia makes appear by a document which the alcalde executed to the two brothers and which I enclose to you, together with the grant of the Garcias, so that after seeing you may order whatever you shall deem proper and may, if Garcia has a right to the land claimed, confirm and approve the same, to obviate all questions which will necessarily result if the latter be not decided by your superiority that the land of the Garcias is included or not in the grant of the last settlers and whether a copy of this grant be taken so that the original, which is the one I enclose, may remain in the archives of the Government confirmed by you, and the same to be done with a copy, subject to what you may direct, which will be the best and most correct, your ordering what I shall do to avoid proceedings annoying your attention. God preserve you many years.

"Ignatio Sanchez Vergara.

"Santa Ana, 1st of December, 1808.

"Lieutenant Colonel José Manrique."

"Advised of your official communication of the first instant and documents you accompany.

"I will state to you that the subject does not require any decision of mine inasmuch as the grant of the Garcias makes their right clear, which grant being the older always has a

preference. The last settlers cannot deny to the Garcias a better title and so these should always remain on the same grant which they have held hitherto; and if the said new settlers do not coincide you will not permit them recourse for and such which they may possess, they will not have the royal audience of Guadalajara, as the documents referred to were sanctioned by former governors of this province and the said royal audience alone can annul them; with which I answer your official communication before mentioned. I return to you the documents mentioned that you may deliver them to the party interested. God preserve you many years.

"Santa Fé, 13th of December, 1808.

"To the alcalde of Jemez."

On the 4th day of June, 1859, certain claimants for themselves and in the name of the actual settlers petitioned the Surveyor General of New Mexico, Pelham, for a confirmation of the grant of March 6, 1798, who took action thereon. In the proceedings it appeared from the evidence that a town existed on the grant some sixty years before and was in existence when the United States took possession, and the testimonio of the original granting papers, heretofore given, certified to as correct and genuine by the alcalde, Don Antonio Armenta, with his attending witnesses, on March 16, 1798, in due form, "at the verbal request of the parties," which was then on file in the office of the Surveyor General, was considered and acted on by him. The Surveyor General made his report to Congress, under date June 10, 1859, approving the grant, and stating that "the evidence shows that the town has been in continuous occupation of the claimants, and was in existence when the United States assumed sovereignty over the country." The grant was thereupon confirmed by Congress, June 21, 1860, 12 Stat. 71, c. 167, § 3. The patent for this grant was issued October 21, 1881, to the original twenty grantees and those claiming under or through them.

In 1879, Amado Chaves, for himself and the other heirs of the two Garcias, petitioned the then Surveyor General, Atkinson, for the approval and confirmation of the grant of 1788,

and in the proceedings before him the papers of that date, together with the certificate of Alcalde Armenta of March 14, 1798, were produced and filed, and considered with the correspondence of 1808, and sundry depositions. The Surveyor General approved the grant, March 22, 1880, and transmitted a certified transcript of the papers for the action of Congress, but the grant was not confirmed.

The evidence tended to show that Francisco and Antonio Garcia were two Spanish brothers, who were interpreters for the Navajos; that Francisco was killed in 1807, and that Antonio died in 1835.

The depositions of two witnesses, one of them the great grandson of Francisco Garcia, born in 1827, and the other the grandson of Antonio Garcia, born in 1807, were taken by Surveyor General Atkinson in January, 1880. Both gave the south boundary of the tract sued for as the junction of the San Diego and the Guadalupe Rivers, "and the lands of the Indian pueblo of Jemez." Both testified that the tract was reputed to belong to the heirs of the two Garcias; that Francisco was reputed to have lived thereon; and that Antonio, who survived until 1835, lived there to their knowledge.

In addition to these depositions, petitioners called as a witness another great grandson of Francisco, born in 1850, who testified that his grandmother was born on the tract, and that "she said the land was occupied and cultivated by them," the two Garcias. What particular part of the tract she was born on and the particular place of occupancy and cultivation did not appear.

The evidence on behalf of the Government was to the effect that Antonio Garcia occupied land several hundred varas in extent, running north from the north boundary line of the Indian pueblo, which was subsequently sold by Antonio's grandson to one of the witnesses, who thereupon took up his residence in Antonio's house; that Antonio said that he had "lands in the Indians' league"; "from the Pueblo Indian league up north"; that the ranches were in the cañon and divided into portions of 300 varas each; that heirs of the original grantees or persons claiming under them still held

original allotments north of the junction of the rivers; and that the smaller grant was not generally known.

The survey of May 18, 1880, was as shown in the map on the next page.

The Court of Private Land Claims, two members dissenting, held that the claim under the grant of 1788 had been abandoned, and dismissed the petition.

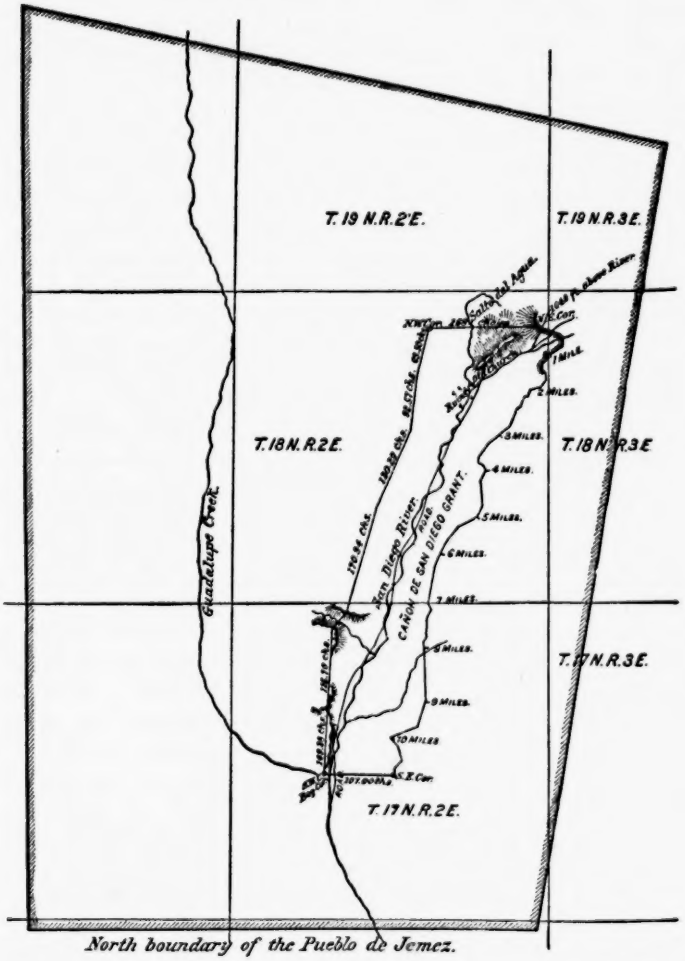
Mr. Henry M. Earle for appellants.

Mr. Matthew G. Reynolds for appellees. *Mr. Solicitor General* was on his brief.

Mr. Chief Justice Fuller, after stating the case, delivered the opinion of the court.

By the Spanish law in force at the time of the alleged grant of 1788, lots and lands were distributed to those who were intending to settle, and it was provided that "when said settlers shall have lived and labored in said settlements during the space of four years, they are hereby empowered, from the expiration of said term, to sell the same, and freely to dispose of them at their will as their own property." But confirmation by the audiencia, or the governor, if recourse to the audiencia was impracticable, after the four years had elapsed, was required in completion of the legal title. Laws Indies, Lib. IV, Tit. 2, Law 1; Royal Order of 1754; 2 White's New Recop. 48, 62. This is admitted except that it is said that confirmation was not needed, and was not usually had, until the settler sought to exercise the power of disposition.

It was also provided that it should "not be lawful to give or distribute lands in a settlement to such persons as already possess some in another settlement, unless they shall leave their former residence and remove themselves to the new place to be settled, except where they shall have resided in the first settlement during the four years necessary to entitle them to fee simple right, or unless they shall relinquish their title to the same for not having fulfilled their obligation." Lib. IV, Tit. 12, Law 2; 2 White, 49.



Plat of the Cañon de San Diego Grant, surveyed by Rob't G. Marmon, U. S. Deputy Surveyor, May, 1880. Scale 80 chains — 1 in.

We are of opinion that the granting papers in this record taken together do not justify the presumption of settlement and working by the two Garcias on the tract contained in the grant of 1788, for the ten years prior to 1798, or for four years thereof, or any confirmation of the grant thereupon; but that the contrary is to be inferred from the testimony in respect of possession; and that Armenta's certificate of 1798 and the correspondence of 1808 conduct to no other result.

The two Garcias were interpreters to the Indians and they may not unreasonably be supposed to have resided, in that capacity, at the pueblo, or on lands claimed by the Indians as appurtenant thereto. The language of the petition and decree of 1788 was perhaps somewhat peculiar, and it is manifest that Governor Chacon regarded "the cultivation and working of the land" by them as not permanent in character; for when the petition for the grant of 1798 was presented to him on behalf of the two Garcias and eighteen others, he referred in his decree to the interpreters as "temporarily stationed" on the tract solicited, and must be assumed to have been aware of the nature of their occupation.

The petition of 1798 was a petition for settlement, and it nowhere intimates that the two Garcias, petitioners "in unison" with the other eighteen proposing to settle, claimed an independent interest in the Cañon de San Diego by virtue of the alleged grant of 1788, but on the contrary it states that "a quantity of vacant and uncultivated land lies in the Cañon of San Diego, adjoining the boundaries of the land belonging to the Indians of the town of Jemez," and that "the settlement thereof would be beneficial to the provinces and advantageous to our present families and descendants." The terms of the decree are entirely inconsistent with the recognition of such a claim, and so is the act of juridical possession. In that act the Alcalde, Armenta, states that in the Cañon de San Diego de los Jemez, having summoned the natives of the pueblo of Jemez, to whom was measured the league belonging to them, he found a surplus of two thousand one hundred varas, which the Indians had, before arriving at the Cañon de San Diego, and were claiming as their own, but to which he

says they had no right in any manner; and believing that it was the wish of the sovereign that his lands be settled by his citizens wherever a surplus was found, finding no impediment, and using the authority in him vested, and finding no one with a better title, and Francisco Garcia and Antonio Garcia, the Navajo interpreters, and the eighteen other petitioners, (naming them,) being present, "all interested and well informed in regard to the matter," he took them over the lands, performing the usual formal acts in proof of legal possession, "which they received quietly and peaceably without any opposition whatever, because, after concluding all these ceremonies, I delivered to each one of the said settlers three hundred varas, with which they were well satisfied, leaving the remainder for the benefit of all, and without any other lands being left for any person to enter"; and he gave them time to understand the boundaries, which were: "On the north, the Vallecito de la Cueva, on the south the termination of the Indian league. On the east, the boundary of Vallecito; and on the west, the opening towards the middle arroyo and the Rito de la Jara"; adding: "and no injury resulting to any one they were all satisfied." Of these boundaries the southern was the north boundary of the Indian pueblo, and in making the subdivision Armenta apparently started from that boundary and, after reaching the junction of the Guadalupe and the San Diego, followed up the San Diego, which flowed through the cañon. He made the distance from the north boundary of the pueblo to the south boundary of the cañon 2100 varas, and, therefore, if he subdivided that space, must have allotted at least 3900 varas within the alleged grant of 1788, for he certified that he delivered to "each one of the said settlers three hundred varas," which would be six thousand varas in all for twenty settlers. The government survey shows that distance to have been something short of 3400 varas. If Armenta meant by "the said settlers" the eighteen co-petitioners, and left to the interpreters as contradistinguished from these settlers what they were cultivating between the two boundaries, then 5400 varas were allotted to the eighteen within the grant of 1788.

In any view, allotments were made north of the south

boundary of the grant now claimed, which was entirely embraced by the grant of 1798.

The evidence for the petitioners did not show where the two interpreters were located and what the particular tract was that was reputed to belong to them in fee, but the evidence for the Government tended sufficiently to establish that they did not actually cultivate any part of the grant of 1788 prior to 1798. It must be conceded that wherever the interpreters were, they were together, and it is quite clear from the testimony that Antonio Garcia, who survived until 1835, when one of the witnesses was twenty years old, cultivated and claimed ownership of land not within the boundaries of the grant of 1788, but between the south boundary of that tract and the north boundary of the Indian pueblo; and the presumption is that this was so in respect of Francisco.

It is true that when Armenta gave juridical possession under the grant of 1788, he described the south boundary as "the junction of the rivers and also a point of a red table land and lands of said Indians." But at that time the Indians claimed to the junction of the two rivers, and no attempt was then made by Armenta to determine the boundary of the pueblo, as it would seem would have been the case if the grant had been of land for settlement with the intention of acquiring the legal title.

When the proceedings were had before the Surveyor General in 1879–80, the original papers of 1788 were produced by claimants, and also an independent paper purporting to have been signed by Armenta on the 14th day of March, 1798, at the cañon, stating "there being assembled all the citizens who took possession of the said cañon, together with Francisco Garcia de Noriega and Antonio Garcia de Noriega, two brothers of the first possessors"; and that "the said Garcias declared in a loud and clear voice, which all heard, because they shouted it with much distinctness, and they all unanimously agreed to abide by what was said by the said Garcias, and their reasons were these. Friends and brothers, now each of you is about to take the lands, which his Majesty has granted and donated to you; but you are all notified that

the lands, which we first and in our first grant, we have been possessing, be all of you aware that I, and my brother are going to enjoy the same freely, without any of those present, nor their children nor anybody else shall desire to interpose obstacles, and because as first possessors we have the right to enjoy said lands and to cultivate them with full title, as well ourselves, our children and our successors." And "all unanimously replied that they asked reasonable justice and that neither by themselves, their children, nor successors would there be interposed any suit or demand against them at any time"; and that they should be left "in peace concerning the said land which they had been so justly possessing." And to this Armenta bore witness, because "all of the citizens declared that it was not to them any imposition that Messrs. Garcias should enjoy the lands which they were heretofore cultivating."

There is nothing to show and we think the presumption cannot be indulged that this so called certificate was brought to the attention of Governor Chacon, and the alcalde certainly had no authority in himself to make an exception to the grant.

The grant of 1798 was a grant for settlement, and by the allotments contemplated to be made and which were made, so many parcels, of three hundred varas each, specifically situated in whole or in part within the cañon and the alleged grant of 1788, were set off, so that if an exception could have been created by this independent paper, it involved the proposition that after the allotments had been made, eighteen of the twenty allottees assented to be deprived of any right or title to the lands which had just been assigned to them, and would have been repugnant to the grant.

Again, there was no intimation of such an exception in the petition, the decree, or the act of juridical possession, nor any mention of the execution of this paper in that act, nor does it appear that it was placed in the archives with the title papers, and when Armenta certified to the testimonio on the 16th of March, 1798, he did not include nor make any mention of this certificate. Moreover, it was not attested by witnesses, as required in the instance of official documents, in the

absence of a public or royal notary, of which there was "none within the limits of all this government," as Armenta certified in the act of juridical possession. It is impossible to treat this paper as of legal validity as an exception, and to give it the same force and effect as the act of juridical possession or as if it were a direct reconveyance.

But treating the paper as genuine and entitled to consideration as evidence, it amounts to nothing more than the statement of an assent on the part of the eighteen that the Garcias should not be disturbed as to the particular land they were cultivating, which we are satisfied from the evidence was not within the grant of 1788 at all. It furnishes no basis for permitting the Garcias to repudiate the official action of the alcalde in making the allotments to their co-petitioners, they having been present, participating in the proceedings, and parties to the transaction from the beginning.

This brings us to consider the papers of 1808, which consist of a communication of Alcalde Vergara to Governor Manrique and an unsigned note purporting to be the governor's reply thereto. The alcalde states that "the interpreter of the Navajos, Antonio Garcia," has presented to him a document in his favor, executed by the former alcalde, Armenta, under the decree of Governor Concha, "as appears from the grant itself, and the whole of the Jemez cañon having been settled under an order of Don Fernando Chacon in a royal grant made to them, and in which it embraced the lands granted to the Garcias, whence results contention between the one and the others, the latter grantees alleging title to all the lands; and I, deeming that the title claimed by Antonio Garcia is founded in law, he having been the prior settler for the period of ten years, with the condition that at the time they were given possession all the new settlers gave their consent, as said Garcia makes appear by a document which the alcalde executed to the two brothers and which I enclose to you, together with the grant of the Garcias, so that after seeing you may order whatever you shall deem proper and may, if Garcia has a right to the land claimed, confirm and approve of the same, to obviate all questions which will necessarily re-

sult if the latter be not decided by your superiority that the land of the Garcias is included or not in the grant of the last settlers." . . .

It will be perceived that the controversy is asserted to be not whether the Garcias' land included that of the other settlers, but whether the land of the latter embraced that of the Garcias. It is this question which the governor is asked to determine. The "others" are plainly the eighteen settlers, and they are the grantees who are said to be alleging title to all the lands. The reply of the governor stated that the subject did not require his decision, "inasmuch as the grant of the Garcias makes their right clear, which grant being the older always has a preference"; and that the last settlers could not deny to the Garcias a better title, and so these "should always remain on the same grant which they have held hitherto." And he added that "if the said new settlers do not coincide," he should not permit them recourse, for "as the documents referred to were sanctioned by former governors of this province," the royal audiencia of Guadalajara alone could annul them.

This correspondence was entirely *ex parte* and without the knowledge of the other settlers, and was in no respect judicial action. The reply signified the individual opinion of the governor, not that the new settlers could be driven from their own holdings, but that they could not claim the land actually occupied by the Garcias. And he expressly declined to adjudicate in the premises because unable to take jurisdiction in respect of documents "sanctioned by former governors." Now what had been sanctioned in 1789 by Governor Chacon was the grant and allotments of that date, and it does not appear that in 1808 the validity of those allotments was questioned. The communication of Vergara related to the land that had been formerly cultivated by the Garcias and to which they were given a preferred right by Armenta at the time of delivering juridical possession in 1798; and Vergara stated that the whole of the cañon had, when he wrote, been settled under the grant of that year.

The Court of Private Land Claims held that Governor

Chacon was justified in regarding the petition to him as in the nature of a request on the part of the Garcias to make to the twenty petitioners a grant of the whole tract within the boundaries specified and as an offer of release of all claims to any part of the land by virtue of the grant of 1788; that the act of juridical possession showed that the twenty petitioners, including the Garcias, were placed in possession and each received three hundred varas of land, leaving the remainder to be held in common; that the certificate of Armenta of 1798 was probably signed before the act of juridical possession, and reasonably bore the construction that the petitioners had agreed, in pursuance of an original understanding, that a colony of twenty persons should be formed, of which the two Garcias should be members, to settle in the cañon and that the Garcias should surrender all claim under the grant of 1788, and accept their proportion of the new grant with the new settlers, share and share alike; that the Garcias accepted the agreement of their co-grantees as a guarantee that in any distribution of the land which might be made their allotments should cover the particular portion which they had theretofore been cultivating; that by thereafter accepting their allotments the Garcias became parties to the official action of the alcalde and were bound by it; and that they each accepted three hundred varas as their equal part in compliance with the terms of the grant and of the agreement, and to their entire satisfaction. On the other hand, it might fairly be argued that Armenta in the act of juridical possession in 1798 left to the Garcias all the land which they were actually cultivating south of the south boundary of the grant of 1788, and assigned to the eighteen last settlers 5400 varas north of that boundary and in the grant itself, and that the certificate of 1798 was merely in authentication of an assent to the allotment to the Garcias, as co-settlers with the eighteen, of lands previously possessed by them south of the grant of 1788, and not to an exception of that grant out of the grant of 1798. Although the Garcias, if they should be regarded as prior settlers, did not "leave their former residence and remove themselves to the new place to be settled," they brought

themselves into connection with it and relinquished whatever rights they had outside of the particular land resided on and cultivated. The 2100 varas were surplus lands so far as the Indians were concerned, and vacant in the sense that the Indians had no title to them, yet nevertheless the interpreters may have been in occupation thereon as outlying Indian lands, and upon the surplus being ascertained, may have asserted a superior right to what they were there cultivating, and demanded that that be conceded in the distribution under the new grant. If this were so, it would satisfactorily explain the certificate of Armenta and the contention referred to by Vergara.

We are not dealing with the rights of the Garcias as between them and other claimants, but with the rights of the Garcias as between them and the Government of Spain, and in that regard the question is whether that Government conveyed to others what had already been conveyed to the Garcias. Whether then the Garcias did or did not take three hundred varas each north of the south boundary of the grant of 1788, they would be equally bound by their participation in the grant of 1798, although in the distribution thereunder they were allotted even more than that south of that boundary under the circumstances.

Accepting either construction of the documents and in the light of all the evidence, the conclusion of the court below was correct.

The suggestion that some of the allotments may have been in the Cañon Guadalupe finds no such support in the record as to require consideration.

Affirmed.